SUPREME COURT, U. S.

APPENDIX

FILED
FEB 10 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5485

ROBERT JOHNSON,

Petitioner,

—v.—

MISSISSIPPI

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR CERTIORARI FILED JULY 2, 1970
CERTIORARI GRANTED JANUARY 11, 1971

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ROBERT JOHNSON

v.

MISSISSIPPI

(Circuit Court of Grenada County, Mississippi)

ORGANIZATION OF THE COURT

STATE OF MISSISSIPPI
COUNTY OF GRENADA — JANUARY TERM, 1967

BE IT REMEMBERED, That a regular term of the Circuit Court of Grenada County, Mississippi was begun and held at the Courthouse in the City of Grenada, Grenada County, Mississippi, there being present as officers of said court the Honorable Marshall Perry, Circuit Judge of the Fifth Judicial District of Mississippi, presiding; Honorable Chatwin M. Jackson, Jr., District Attorney of said district; Suggs Ingram, Sheriff of said county; Mrs. Aline B. Worsham, Circuit Clerk of said County, and W. W. DeLoach, Official Court Reporter of said district.

Court being duly opened according to law by proclamation of the Sheriff, the transaction of business was begun, when the following proceedings were had, to-wit:

IN THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI

JANUARY TERM—1967

Cause No. 3581

IN RE: ROBERT JOHNSON

PETITION

TO THE HONORABLE CIRCUIT COURT OF GRENADA COUNTY, MISSISSIPPI:

Comes now the State of Mississippi acting by and through Chatwin M. Jackson, District Attorney for the fifth Circuit Court District of which Grenada County is a part and would respectfully show unto the Court the following:

That on the morning of January 23, at approximately 9:05 A. M., the said Robert Johnson entered the Court room of the Grenada County Courthouse at a time when Circuit Court had been open and was in session. That at the time said Johnson entered the Court room the Circuit Judge had previously seated all prospective jurors in the front rows nearest the bench and had told all persons present not to walk in front of the Jury, but to proceed along the side wall and go behind the Jury to take their seats wherever they wished to in the Court room when Robert Johnson entered the Court room. Mr. Aaron Lott, who was then acting as a Court room deputy told said Johnson, who had then walked in front of the Jury, to turn around and go behind to the back. This was observed by the Sheriff, Suggs Ingram, who thereupon immediately walked over to where Johnson and Mr. Lott were standing and the said Sheriff also told Robert Johnson to go around behind the Jury. Whereupon Robert Johnson said in a loud and offensive voice, "what the hell do you mean go around". At that stage the Sheriff and Deputy Sheriff, Howard Hayward seized

Robert Johnson and immediately carried him before the Circuit Judge, Marshall Perry, and related to the Judge what had transpired. The Judge then instructed the Sheriff to arrest Robert Johnson for contempt of Court and made this announcement in open Court in such a tone of voice that it could be heard by all spectators. The Circuit Judge thereafter requested that the District Attorney and the County Prosecuting Attorney file a petition citing and requiring Robert Johnson to show cause why he should not be punished for a contempt of the Circuit Court of Grenada County, Mississippi.

Respectfully submitted.

JIM MCRAE CRISS
JIM MCRAE CRISS
Grenada County
Prosecuting Attorney

CHATWIN M. JACKSON
CHATWIN M. JACKSON
District Attorney

Sworn to and subscribed before me on this the 24th day of January, 1967.

MRS. ALINE B. WORSHAM
Circuit Clerk

[Filed Jan. 24, 1967, Mrs. Aline B. Worsham, Circuit Clerk, By Florence Rogers, D.C.]

IN THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI

Cause No. 3581

IN RE: ROBERT JOHNSON

FIAT

TO THE CIRCUIT CLERK OF GRENADA COUNTY, MISSISSIPPI:

You are hereby directed to issue process directed to any lawful officer of Grenada County, Mississippi, directing said officer to command Robert Johnson to be and appear before the Circuit Court of Grenada County, Mississippi at 9 o'clock A. M. on February 1st, 1967, then and there to show cause, if any he can, why he should not be found in Contempt of this Court.

So Ordered and Adjudged, on this the 24 day of January, 1967.

MARSHALL PERRY
Circuit Judge

[Filed Jan. 24, 1967, Mrs. Aline B. Worsham, Circuit Clerk, By Florence Rogers, D.C.]

IN THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI

STATE OF MISSISSIPPI

vs

ROBERT JOHNSON

MOTION TO RECUSE

Comes now the defendant in the above captioned case and moves that the Judge now presiding, the Honorable Marshall Perry, recuse himself from the trial of this cause on the following grounds.

1. The defendant herein is an active Negro civil rights worker, which fact is, upon information and belief, well known to Judge Perry.

2. That on January 23, 1967, the first day of the January, 1967 term of Court, the Honorable Marshall Perry, upon information and belief, those selected to constitute the present venire, in a manner which shows:

a. That Judge Perry is personally prejudiced against the defendant and against the civil rights organizations he represents.

b. That Judge Perry is personally prejudiced against the lawyers' organization defending Mr. Johnson, namely the Lawyers' Committee For Civil Rights Under Law.

3. That on January 23, 1967, Judge Perry witnessed the arrest of the defendant in his courtroom and ordered the County Attorney to prepare a petition for Contempt of Court against the defendant, for acts allegedly committed on that date in the Grenada County Court House, which resulted in the arrest and jailing of defendant.

4. In support of paragraph two herein contained, please find attached two affidavits containing part of the charge given by the Honorable Marshall Perry to the Grand Jury for the January, 1967 term of the Circuit

Court, and part of the charge given by the Honorable Marshall Perry to the Grand Jury for the July, 1966 term of the Circuit Court.

5. That unless the Honorable Marshall Perry does recuse himself, then this defendant will be deprived of his right to a fair and impartial trial under the Fourteenth Amendment to the United States Constitution and Section Fourteen of the Mississippi Constitution.

Dated: January , 1967.

Respectfully submitted

L. LACKEY ROWE
L. LACKEY ROWE, JR.

[Filed Jan. 27, 1967, Mrs. Aline B. Worsham, Circuit Clerk, By Florence Rogers, D.C.]

(Circuit Court of Grenada County, Mississippi)

AFFIDAVIT OF B. E. BERGESEN, III

STATE OF MISSISSIPPI)
) SS
COUNTY OF HINDS)

AFFIDAVIT IN SUPPORT OF DEFENDANTS' MOTION MADE BEFORE THE CIRCUIT COURT OF GRENADA COUNTY, TO RECUSE THE HONORABLE MARSHALL PERRY

B. E. Bergesen, III, being duly sworn, deposes and says:

1. I am an attorney for the Lawyers' Committee for Civil Rights under Law, 233 North Farish Street, Jackson, Mississippi. I am a member of the United States District Court for the District of Columbia, the United

States District Court for the Northern District of Mississippi, the United States Court of Appeals for the Fifth Circuit, and the United States Court of Appeals for the District of Columbia Circuit.

2. On Monday, January 23, 1967, I was present in the Circuit Court of Grenada County during the part of the charge given by the Honorable Marshall Perry to the Grand Jury for the January, 1967 term of the Circuit Court, said charge being given upon information and belief, in the presence of most, if not all, of the jurors constituting the present venire. Said charge was made in open Court, before members of the public, presumably citizens of the City and County of Grenada. The following is an account of that portion of the charge which dealt with the Lawyers' Committee for Civil Rights under Law. It does not purport to be a quotation of the exact words used by Judge Perry but rather sets out the substance of these remarks as reconstituted from notes which I made during the charge. All of that portion of the charge dealing with the Lawyers' Committee for Civil Rights under Law, as set forth in substance below, was made in my presence and was heard by me. The substance of that portion of the charge is as follows:

(a) Recently there have been some lawyers who have come into the state from outside the state to assist and aid pro-socialist and pro-communist agitators. They have engaged in the unauthorized practice of law, and have solicited business.

(b) One group of such outside lawyers has a letterhead reading "Lawyers' Committee for Civil Rights under Law" and has an address on North Farish Street in Jackson. There are two other such groups which also have North Farish Street addresses, but the first one is apparently the most active, at least in this area. They have made no effort to adhere to the statutes or legal ethics. In particular, they have not bothered to comply with Sections 8682 and 8666 of the Mississippi Code.

(c) These groups have set up offices in Jackson, although claiming to be non-resident lawyers. They know

little of Mississippi practice and procedure and nothing of legal ethics. They have openly, illegally, and notoriously solicited business by use of agents and panderers.

(d) One group claimed to represent a man in Kosciusko who was charged with grand larceny. However, the man swore in court that he had never employed them and didn't want their services.

(e) These lawyers will go to jailers and seek to interview and represent accused persons, especially Negroes. When they come, I hope you run them out or make them show evidence of up-to-date permits to practice law in this state. I hope Sheriffs won't let them use jails to agitate. If you treat them courteously then they only take advantage of you.

(f) Most of these lawyers seem to have Washington or New York addresses, and about 90% are Jews. In saying this I do not mean to deprecate Jews; I am just observing the facts. These agitators are not concerned with the welfare of the Negro, they are interested only in what they can get out of it. They wish only to enrich themselves. They stay in a community only as long as it is financially profitable. After that they leave, without regard to the people who have been depending on them.

3. The judge also stated that there had been a number of threats and acts against the local Negroes who would not co-operate with the civil rights organizations, were scared not to and scared to report fully threats against them to local authorities.

4. L. Lackey Rowe, Jr., the attorney for the aforesaid defendants, appeared on their behalf in the Circuit Court of Grenada County today in open court on the first day of the January term with Judge Perry presiding. Mr. Rowe is intending to represent the aforesaid defendants at their criminal trials and in the hearing on said defendants' motion to quash the jury venire, filed today. Mr. Rowe is employed by the aforesaid Lawyers' Committee for Civil Rights under Law, a fact of association which, upon information and belief, Judge Perry is throughly familiar with. Miss Marion Wright

is to associate with Mr. Rowe in the handling of the criminal trials of said defendants. Miss Wright is an attorney and is one of the civil rights lawyers on North Farish Street in Jackson to whom Judge Perry referred.

B. E. BERGESEN, III
B. E. BERGESEN, III

Sworn to and subscribed before me
me this 23rd day of January, 1967.
SARAH B. SMITH
Notary Public
My commission Expires Aug. 31, 1970

[Filed Jan. 27, 1967, Mrs. Aline B. Worsham, Circuit Clerk, By Florence Rogers, D.C.]

IN THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI

AFFIDAVIT OF PETER G. EIKENBERRY

No. 3500

STATE OF MISSISSIPPI

—v—

JAMES BULLOCH

AFFIDAVIT

PETER G. EIKENBERRY, being duly sworn deposes and says:

On July 25, 1966 I was present in the Circuit Court of Grenada County when the Honorable Marshall Perry addressed the Grand Jury for the July, 1966 term of this Circuit Court in the presence of other prospective

jurors including, on information and belief, most of the jurors constituting the present venire.

The following is an account of the substance of his remarks as reconstituted from my notes taken during the address and supplemented by my recollection:

A turmoil has visited on our State through no fault of our own, attended by arrogant demands, threats of burning of courthouses, etc. The people with the so-called march are looking for places to cause violence and there is an ugly communistic overtone to the whole situation.

When I was a boy on the farm, if I saw a snake I took a club, hit it in the head and killed it. If I didn't have a club I walked away from the snake. I never negotiated with him. You can't negotiate with a snake.

I would like to praise all of the police and the merchants. Negroes have been threatened and, in some instances, beaten by agitators. That is the reason they are staying away from the stores. These people are Twentieth Century "Carpetbaggers." While we are fighting communists in Viet Nam, the federal government is building a strong communistic party in our midst. Senator Eastland has named eleven communists who took part in the "March." There are many more and were many more in that march.

The "March" got active support from "Ole Miss" and Millsaps. Senator Billboe was the first to point out the communistic threat at those two colleges.

Agents of the Department of Justice are ready to bribe and purchase testimony. Examples are the recent Alabama cases.

I am not here to promote the Klan, but the NAACP, CORE, SNCC and others similar communistically led and infiltrated organizations have caused more bloodshed than the Klan has caused in Mississippi in a hundred years.

These people don't know, but they will find out, that there is no soft spot in Grenada.

The Court recommends that:

1. County officials make all efforts to get those people off the rolls that were fraudulently registered during the

"March." There are many reported instances of double and triple registration.

2. County and City employees have joined in the activity. They have missed work to participate. Several names have been given to the Grand Jury. I recommend a thorough investigation. I urge County officials to discharge employees who have neglected work to participate in these illegal activities.

3. There should be an investigation into the part played by the employees of "Head Start." It is reported that employees of Head Start followed the "March" and engaged in its activities. Head Start activities are a brooding place for criminal and subversive activities.

4. You should investigate the threats to Negroes of Grenada. An integrationist is a person who is ashamed of his race. I urge that everyone make a special effort to buy from our merchants.

5. I recommend that the police keep on hand riot gear, that they be trained in its use.

6. I recommend that the police purchase six or seven police dogs.

7. I recommend that the rules for the operation of the court house be published and that they be enforced.

Once again, I wish to thank the police and the State Highway Patrolmen who must bear a portion of their expenses themselves.

I caution any citizen from taking the law into his own hands. The police should enforce the law.

PETER G. EIKENBERRY

Sworn to and subscribed to before
me this 27th day of July, 1966.
MRS. ALINE B. WORSHAM
Notary Public
My commission expires: 1st Monday January, 1968

[Filed July 27, 1966, Mrs. Aline B. Worsham, Circuit Clerk]

[Filed Jan. 27, 1967, Mrs. Aline B. Worsham, Circuit Clerk, By Florence Rogers, D.C.]

(Circuit Court of Grenada County, Mississippi)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. 3581

STATE OF MISSISSIPPI, PLAINTIFF-RESPONDENT

—*v*—

ROBERT JOHNSON, DEFENDANT-PETITIONER

NOTICE OF REMOVAL

TO: CHATWIN JACKSON, ESQ.
District Attorney
Grenada County Courthouse
Grenada, Mississippi

HON. MARSHALL PERRY
Judge
Grenada County Circuit Court
Grenada, Mississippi

PLEASE TAKE NOTICE that the attached Petition for Removal was filed on February 1, 1967, in the United States District Court for the Northern District of Mississippi, Western Division.

February 1, 1967.

Respectfully submitted,

DENISON RAY
DENISON RAY
B. E. BERGESEN, III
233 North Farish Street
Jackson, Mississippi
Attorney for
Defendant-Petitioner

[Filed Feb. 1, 1967, Mrs. Aline B. Worsham, Circuit Clerk, By Florence C. Rogers, D.C.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No.

STATE OF MISSISSIPPI, PLAINTIFF-RESPONDENT

—*v*—

ROBERT JOHNSON, DEFENDANT-PETITIONER

PETITION FOR REMOVAL

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1443 (1), as construed by the Supreme Court of the United States in *Georgia* v. *Rachel*, —— U.S. ——, 16 L. Ed. 2d 925 (1966), *City of Greenwood* v. *Peacock*, —— U.S. ——, 16 L. Ed. 2d 944 (1966), and *Strauder* v. *West Virginia*, 100 U.S. 303 (1879).

2. Defendant-petitioner Robert Johnson is a Negro. He is a resident and citizen of the City and County of Grenada, State of Mississippi; and is now and has been active, at all times pertinent herein, in the civil rights movement in the City and County of Grenada since its inception in June of 1966. The Negroes of Grenada have long been the victims of discrimination, segregation and oppression on account of their race. As a means of overcoming such discrimination, segregation and oppression, and as a part of his activities in the civil rights movement, Robert Johnson has urged the Negroes of Grenada to register to vote, to exercise their right to vote and to exercise their right to the full and equal enjoyment of places of public accommodation. Robert Johnson is now, and at all times pertinent herein has been, a staff member of the Southern Christian Leadership Conference, Inc., and the "project leader" of the Southern Christian Leadership Conference's activities in support of the civil rights movement in Grenada.

3. Robert Johnson's activities in the civil rights movement in Grenada are well-known to the Grenada County

prosecutor, Jim Criss; to the Grenada County Sheriff, Suggs Ingram, and his deputy sheriffs; to a constable of Grenada County, Grady Carroll; to a large segment of the white population of Grenada County and City including, upon information and belief, a substantial number of those comprising the venire at the January 1967 Term of the Grenada County Circuit Court; and, upon information and belief, to the Grenada County Circuit Court judge, the Honorable Marshall Perry, and to the District Attorney of Grenada County, Chatwin Jackson.

4. January 23, 1967, was the opening day of the January 1967 Term of the Grenada County Circuit Court. At the opening of the Court the members of the jury venire were present and seated in one of the two sections of the courtroom intended for the general public. Those two sections each consists of several rows of wooden benches similar to church pews. The two sections are divided by a middle aisle and there is, in addition, an aisle on each side of the public part of the courtroom. The public, including defendants in pending cases not yet being heard, are permitted to enter the courtroom only through one set of double doors. The aforesaid veniremen, virtually all of whom were white, were seated in that section of the courtroom nearest to the doors through which the public had to enter and filled up the front and several more rows of that section. Therefore, of necessity anyone entering the public portion of the courtroom would have to cross in front of the section of veniremen in order to reach the far section of the public seats.

5. When court convened at 9:00 A.M. on January 23, Judge Perry, upon information and belief, announced that there would be in effect a rule of his court which prohibited anyone entering the public portion from walking in front of the veniremen whom, as noted, were seated immediately next to the public doors. Defendant-petitioner Robert Johnson was to be present in said Circuit Court that morning inasmuch as he was a defendant in certain criminal cases on the docket at that term of said court. Many other members of the civil rights movement in Grenada were also defendants in cases on

that docket and were seated in the section on the far side of the courtroom, i.e., away from the public doors. At approximately 9:05 A.M. Robert Johnson entered the courtroom and started to walk across to the far section to sit with said other defendants, passing as he did so directly in front of the veniremen seated in the near section. At that point Robert Johnson was abruptly apprehended by one or more officers of the court acting on behalf of the court and the County of Grenada. Said officers ordered Robert Johnson to go down the side aisle behind the section of veniremen. When Robert Johnson sought an explanation of this irrational and bewildering order which treated him like the "nigger" which Grenada Negroes had long been subjected to, he was physically removed from the courtroom, arrested for contempt of court upon the direction of Judge Perry and ordered to be taken to jail, again upon the instruction of Judge Perry. The removal from the courtroom, arrest and jailing were performed by the aforesaid Constable Grady Carroll, Sheriff Suggs Ingram and his deputies, acting on behalf of the Circuit Court and County of Grenada.

6. As a result of the foregoing events, during the week of January 23, 1967, a citation for criminal contempt has been issued against defendant-petitioner by the Circuit Court of Grenada County, and trial on that charge is to be had in the Circuit Court of Grenada County on February 1, 1967. No copy of said citation has been served upon defendant-petitioner but attached hereto is a copy of the summons for Robert Johnson to appear in connection with said charge, this summons being the only document served upon defendant-petitoiner in connection with said charge.

7. The aforesaid rule of court promulgated by Judge Perry, was upon information and belief, enforced only against Negroes and not against white persons. Each Negro, including Robert Johnson, who attempted to walk in front of the section of jury veniremen, while entering or leaving the courtroom was prevented from doing so by officers of the court and county while each white person was allowed to pass in front of the veniremen without interference.

8. Under Title II, § 202, of the Civil Rights Act of 1964, defendant-petitioner was given the right to be free, at any establishment or place, from discrimination or segregation of any kind on, the ground of race or color where such discrimination or segregation is required by, among other things, any regulation, rule or order of the State or any agency thereof. Section 203 of said Title and Act forbids all persons from intimidating, threatening or coercing, or attempting to intimidate, threaten or coerce anyone with the purpose of interfering with any right or privilege secured by § 202. The systematic and discriminatory enforcement by Judge Perry and the officers of his court of the rule for whose violation Robert Johnson was arrested constitutes a denial of defendant-petitioner's rights under § 202. Robert Johnson's subsequent arrest and pending prosecution are acts or attempted acts of intimidation, threat and coercion in violation of § 203. Such discriminatory enforcement and defendant-petitioner's ensuing arrest and pending prosecution constitute a denial of the equal civil rights of Robert Johnson in the state courts of Mississippi within the meaning of 28 U.S.C. § 1443(1) and permits removal of said prosecution under § 1443(1), as construed by the United States Supreme Court in *Georgia* v. *Rachel* and *City of Greenwood* v. *Peacock*, *supra*.

9. Under Title III, § 301, of the Civil Rights Act of 1964, defendant-petitioner was given the right to the equal utilization of any public facility which is owned or operated or managed by or on behalf of any state or subdivision thereof without regard to race or color. Defendant-petitioner was also given the right under that section to be free of any threat or deprivation of the aforesaid right to equal utilization. The systematic and discriminatory enforcement by Judge Perry and the officers of his court of the rule for whose violation Robert Johnson was arrested constitutes a denial of defendant-petitioner's rights under § 301. Robert Johnson's subsequent arrest and pending prosecution are threats of deprivation in violation of § 301. Such discriminatory enforcement and defendant-petitioner's ensuing arrest and

pending prosecution constitute a denial of the equal civil rights of Robert Johnson in the state courts of Mississippi within the meaning of 28 U.S.C. § 1443(1) and permits removal of said prosecution under § 1443(1), as construed by the United States Supreme Court in *Georgia* v. *Rachel* and *City of Greenwood* v. *Peacock, supra.*

10. Under 42 U.S.C. § 1981, defendant-petitioner was given the right to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall not be subject to any punishment, penalty or the like to which white citizens are not subjected. The systematic and discriminatory enforcement by Judge Perry and the officers of his court of the rule for whose violation Robert Johnson was arrested constitutes a denial of defendant-petitioner's rights under § 1981. See *Hamilton* v. *Alabama*, 376 U.S. 650 (1964), *reversing per curiam* 156 So. 2d (1963); *Johnson* v. *Virginia*, 373 U.S. 61 (1963). Robert Johnson's subsequent arrest and pending prosecution are acts constituting punishment and penalty in violation of § 1981. Such discriminatory enforcement and defendant-petitioner's ensuing arrest and pending prosecution constitute a denial of the equal civil rights of Robert Johnson in the state courts of Mississippi within the meaning of 28 U.S.C. § 1443(1) and permits removal of said prosecution under § 1443(1), as construed by the United States Supreme Court in *Georgia* v. *Rachel* and *City of Greenwood* v. *Peacock, supra.*

11. Defendant-petitioner's arrest and prosecution have been carried out, upon information and belief, with the purpose and effect of: (1) interfering with Robert Johnson's attempt to peacefully urge other Negroe citizens of Grenada to register to vote, and to vote, which purpose is prohibited by § 11(b) of the Voting Rights Act of 1965; and (2) punishing Robert Johnson for exercising his rights and attempting to urge others to exercise their rights under § 201 of the Civil Rights Act of 1964, which purpose is prohibited by § 203 of the Civil Rights Act of 1964. Said purpose and their implementation by defendant-petitioner's arrest and pending prose-

cution constitute a denial of the equal civil rights of Robert Johnson in the state courts of Mississippi within the meaning of 28 U.S.C. § 1443(1) and permits removal of said prosecution under § 1443(1) as construed by the United States Supreme Court in *Georgia* v. *Rachel* and *City of Greenwood* v. *Peacock, supra.*

12. Under 42 U.S.C. § 1981, as aforesaid, and under the uniform body of federal case law construing the Fourteenth Amendment to the United States Constitution, defendant-petitioner is given the right to a fair trial and to have his pending prosecution tried before a jury selected without discrimination on the grounds of race or sex. See *Strauder* v. *West Virginia*, 100 U.S. 303 (1879). Such rights are denied Robert Johnson or cannot be enforced by him in the Circuit Court of Grenada County because:

(a) Defendant-petitioner is to be tried in the same court whose arbitrary and discriminatorily-applied rule he "violated" and before the same judge who promulgated said rule and who ordered defendant-petitioner's arrest and that a contempt citation be sworn out against him. This is a violation of due process under *In the Matter of Murchison*, 349 U.S. 133 (1955).

(b) By, upon information and belief, his charges to the grand jury at the opening of the July 1966 and January 1967 Terms of the Grenada County Circuit Court, by his baseless ordering the arrest of defendant-petitioner's attorney at the January 1967 Term, by his treatment of defendant-petitioner at said Term and upon information and belief, by various other acts and statements, Judge Perry has demonstrated his bias against and pre-judgment of defendant-petitioner, his attorney, the civil rights organizations to which defendant-petitioner belongs and the civil rights law group with which his attorney is affiliated.

(c) Upon a hearing in the Grenada County Circuit Court on January 30, 1967, on a motion to quash

the jury venire in a pending criminal case, the self-same venire that would serve at Robert Johnson's trial, it was conclusively demonstrated that there has been systematic exclusion of Negroes from said jury venire.

(d) Section 1762 of the Mississippi Code, expressly prohibits the service of women upon the juries of Mississippi. In fact upon information and belief, no women were called to serve upon the venire that would serve at defendant-petitioner's pending trial.

13. With respect to the equal civil rights of defendant-petitioner, as set forth in paragraphs 8-11 *supra*, such rights cannot be enforced in the Circuit Court of Grenada County for the reasons alleged in subparagraphs (a)-(d) of paragraph 12 herein.

14. Inasmuch as the proceeding sought to be removed is criminal, no bond or filing fee is required.

WHEREFORE, defendant-petitioner prays that the aforesaid criminal prosecution be removed to this Court from the Circuit Court of Grenada County, Mississippi, for trial pursuant to 28 U.S.C. §§ 1443 (1) and 1446.

February 1, 1967.

Respectfully submitted,

DENISON RAY
DENISON RAY
B. E. BERGESEN, III
233 North Farish Street
Jackson, Mississippi
Attorneys for
Defendant-Petitioner

[Filed Feb. 1, 1967, Mrs. Aline B. Worsham, Circuit Clerk, By Florence C. Rogers, D.C.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No.

STATE OF MISSISSIPPI, PLAINTIFF-RESPONDENT

—*v*—

ROBERT JOHNSON, DEFENDANT-PETITIONER

VERIFICATION

STATE OF MISSISSIPPI)
) SS.:
COUNTY OF GRENADA)

ROBERT JOHNSON, being duly sworn, deposes and says:

1. I am a Negro citizen and resident of the United States and of the City and County of Grenada, Mississippi. I am the defendant-petitioner herein and make this affidavit and verification in support of my petition for removal and pursuant to 28 U.S.C. § 1446(a) and the Rules of this Court.

2. I have read the annexed petition for removal and know the contents thereof. I know of my own personal knowledge that all facts stated in said petition for removal are true except such as are stated on information and belief and as to those facts, I believe them to be true.

ROBERT JOHNSON
ROBERT JOHNSON

Sworn to before me this
1st day of February, 1967.
TURNER M. BRANFORD
Notary Public
My commission Expires December 6, 1970.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. CRW 6729-S

STATE OF MISSISSIPPI, PLAINTIFF

v.

ROBERT JOHNSON, DEFENDANT

ORDER

In his petition for removal, the plaintiff maintains that he has been unjustly discriminated against by the Judge of the state trial court when he was held in contempt of that court. He alleges that this action is in direct conflict with Title II, § 202 of the Civil Rights Act of 1964, and, therefore, this case is removable under 28 U.S.C. § 1443. However, it is the opinion of this Court that this action is controlled by *Greenwood* v. *Peacock*, 384 U.S. 808, 86 S.Ct. 1800, 16 L. Ed. 2d 944 (1966). In *Peacock*, the Court pointed out that if what the petitioner says is true, then there has in fact been

> an outrageous denial of (his) federal rights, and the federal courts are far from powerless to redress the wrongs done to (him). The most obvious remedy is the traditional one emphasized . . .—vindication of (his) federal claims on direct review by this court, if those claims have not been vindicated by the trial or reviewing courts of the State. . . .
>
> But there are many other remedies available in the federal courts to redress the wrongs claimed. . . . If . . . there is a complete absence of evidence against (the petitioner), (his) conviction will be set aside because of a denial of due process of law. . . . If at (his) trial (he is) in fact denied any federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to (him). . . . If (his) federal claims at trial have been de-

nied through an unfair or deficient fact-finding process, that, too, can be corrected by a federal court. . . . 384 U.S. at 828-830, 16 L. Ed. 2d at 957-58.

This lengthy passage is cited in order that it might be clear that while removal has been denied in this case, the petitioner has adequate means available to prevent encroachment of his federally guaranteed rights. Therefore, in accordance with the Opinion signed today, it is

ORDERED:

1) That the above-styled case is ordered remanded to the Circuit Court of Grenada County, Mississippi.

2) That the petitioner is ordered to surrender to the Sheriff of Grenada County, Mississippi on or before the 1st day of December, 1968.

3) That this Court retains jurisdiction of this cause insofar as it is necessary to require compliance with the requirements of this Order.

This the 14 day of November, 1968.

/s/ Orma R. Smith
ORMA R. SMITH
District Judge

I hereby certify that the foregoing is a true copy of the original thereof now in my office.

Attest 6-20-69
WILLIAM T. [Illegible]
Clerk
By /s/ Katherine [Illegible]

I have this day executed the within writ personally by delivering to the within named defendant Robert Johnson a true copy of this writ.

This the 29 day of Nov. A. D. 1968

JESSE STRIDER
Sheriff
By FLOYD WOLFE
D. S.

(Circuit Court of Grenada County, Mississippi)

APPEARANCE BOND

STATE OF MISSISSIPPI)
COUNTY OF GRENADA)

We, Robert Johnson, Principal and Lawrence E. Smith and Ruby Savage, Sureties agree and bind ourselves to pay unto the State of Mississippi One thousand & No/100 - - - - Dollars ($1000.00) unless the said Robert Johnson shall appear before the Circuit Court of Grenada County, at the next term thereof held at the Courthouse of said County in the City of Grenada on the 27th day of January, 1969, to answer a charge of Contempt of Court and then and there remain from day to day and term to term, until discharged by law, said charge being by Commitment to await the Action of the Grand Jury.

Witness our signature this the 29th day of November, A. D., 1968.

/s/ Robert Johnson Principal
/s/ Lawrence E. Smith Surety
/s/ Ruby Savage Surety

SURETIES OATH

STATE OF MISSISSIPPI)
COUNTY OF GRENADA)

Personally appeared before me, Robert Johnson of said County and Lawrence E. Smith and Ruby Savage sureties on the within bonds, who each being duly sworn, state on oath, that they are worth, in property in Grenada County, subject to execution at law, over and above all indebtedness and exemptions the amount of this bond.

/s/ Lawrence E. Smith Surety
/s/ Ruby Savage Surety

Sworn to and subscribed before me, this the 29th day of November, 1968.

[SEAL]

/s/ Orley Lilly
My commission Expires First Monday in January, 1972

APPROVED, this 29th day of November, 1968.

JESSE A. STRIDER Sheriff
By ---------- Deputy

[Filed Nov. 29, 1968, Orley Lilly, Circuit Clerk]

November 28, 1968

This is to certify that each of the undersigned persons below is willing to pay one 7th of the amount of the property bond that Rev. L. E. Smith is making for Robert Johnson if anything occurs to cause the responsibility to be his.

Signed Rev. B. J. Cameron
Mrs. Essie L. Mullen—Miss Mable Willmington
Mrs. Paulette B. Williams
Mrs. S. M. Springfield Versie L. James
Mrs. B. M. Askew
Mrs. Catherine Johnson, Mother

IN THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI

SUMMONS

STATE OF MISSISSIPPI
The Sheriff of Grenada County—Greetings:

You are hereby commanded to summon ROBERT JOHNSON instant, if to be found in your county, to be, and personally appear before the Circuit Court of Grenada County at a term of court to be held at the county courthouse of said county in the City of Grenada, Mississippi, 9:00 A.M., February 1st 1967, then and there to show cause, if any he can, why he should not be punished for contempt of said court in cause number 3581 now on file in said Court, and have you then and there present with your proceedings endorsed hereon.

Issued under my hand and the seal of said court in my office at Grenada, Mississippi, on this the 24 day of Jan. 1969.

/s/ Mrs. Aline B. Worsham
Clerk, Circuit Court

By .....
D. C.

IN THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI

REGULAR JANUARY TERM 1969

No. 3581

STATE OF MISSISSIPPI, PLAINTIFF

vs

ROBERT JOHNSON, DEFENDANT

Appearances:

Honorable Martha M. Wood, Jackson, Miss. appearing for the defendant.
Honorable G. Jyles Eaves, District Attorney, Louisville, Miss. and
Honorable John T. Keeton, County Prosecuting Attorney, Grenada, Miss. appearing for the State.

Be It Remembered, that this cause came on to be heard on the 27th day of January, A.D. 1969, being a day of the regular January 1969 term of the Circuit Court of Grenada County, Miss. and there being present as officers of said Court the Honorable Marshall Perry, Circuit Judge of the Fifth Circuit Court District of Miss. presiding, Jesse Strider, Sheriff of said County, Orley Lilly, Circuit Clerk of said County, and W. W. DeLoach, official Court Reporter of said district.

The following proceedings were had, to-wit:

IN THE CIRCUIT COURT OF GRENADA COUNTY, MISSISSIPPI

Regular January, 1969 Term

No. 3581

STATE OF MISSISSIPPI

vs

ROBERT JOHNSON, DEFENDANT

ORDER ADJUDGING ROBERT JOHNSON IN CONTEMPT AND PROVIDING PUNISHMENT, ETC.

The within matter this day came on for consideration, and the Court hereby finds and adjudicates as follows:

That on the morning of January 23, 1967, on the opening day of the regular January, 1967 term of this Court, at approximately ten minutes after nine o'clock the within Robert Johnson (he being at that time a defendant in a criminal case pending in said Court), entered the court room at a time when Court was in session and jurors were being called. The Judge had previously that morning in open court made the announcement that all persons entering the court room that morning were to walk along the aisle near the side wall leading from the door, going toward the back of the room and then find seats anywhere in the room outside the space reserved for jurors and county officers, and the court especially emphasized that no person was to walk between this reserved section and the Judge while jurors were being called. The purpose of this rule was to help expedite the work of the court and make for more orderly proceding. All Bailiffs and Deputies on duty were instructed to enforce this rule and to instruct all persons entering the room after the announcement was made in open court.

When the said Robert Johnson (hereinafter called defendant) entered the court room, as above stated and after said rule had been announced, the Deputy Sheriff stationed near said door (Mr. Aaron Lott) instructed the defendant as to said rule and told him to go down said aisle toward the back; whereupon said defendant, in a loud and defiant tone of voice which was heard by

many people throughout the court room and was heard by the Judge, said: "What the Hell do you mean go around." Said Johnson, defendant, then continued to stand and look around over the room, disrupting the court proceedings. The Sheriff and another Deputy, on order of the Court, arrested said Johnson and brought him before the Bench. The Court advised said defendant that he was in contempt and would be sentenced later during the court term.

About two or three days later, during that same week and before the Court had imposed sentence and judgment in this matter, a petition was filed on behalf of said defendant by his attorney in the United States District Court at Oxford, Mississippi, the effect of which was to remove said case out of the hands and control of the within State Court, temporarily and pending action thereon by said federal court. By order of the said U. S. District Court, dated November 14, 1968 the said case was returned to the Circuit Court of Grenada County, Mississippi. Upon being informed by the Clerk of said action by the Federal Court, this Court proceeded in vacation to order within defendant to post a bail bond to guarantee his appearance at the first day of the next regular term of court, which date was January 27, 1969. The said defendant posted said bail bond without being placed in custody.

That this Court now has jurisdiction of both the defendant and the subject matter, and the authority to enter this sentence and judgment, this court having inherent power to punish for criminal contempt.

Wherefore, it is hereby ordered and adjudged that said Robert Johnson, within defendant is hereby adjudged in criminal contempt, and for said direct contempt done and committed in open Court and in the presence of the Judge and Court, is hereby sentenced to serve a term of four months in the Grenada County jail and pay all court cost in this matter.

So ordered and adjudged in open Court on this the 27th day of January, 1969.

MARSHALL PERRY
Circuit Judge

IN THE SUPREME COURT OF MISSISSIPPI

Misc. No. 81

[Received & Filed Jan. 28, 1969, Julia H. Kendrick, Clerk, Yvonne Burnhem, D.C.]

ROBERT JOHNSON

v.

STATE OF MISSISSIPPI

ORDER

Upon notice and hearing of counsel for petitioner and the State of Mississippi, it is hereby

ORDERED that the appearance or bail bond of petitioner Robert Johnson be reduced pending appeal from $2,000 to $300.00, pursuant to the provisions of Mississippi Code 1942 Annotated section 1152 (1956).

This the 28th day of January, 1969.

W. N. ETHRIDGE, JR.
Chief Justice
Supreme Court of Mississippi

[Filed Mar. 13, 1969, Orley Lilly, Circuit Clerk, By Florence Rogers, D.C.]

IN THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI

Criminal Action No. 3581

STATE OF MISSISSIPPI, PETITIONER

—*vs*—

ROBERT JOHNSON, RESPONDENT

NOTICE OF APPEAL TO THE CIRCUIT CLERK

TO: Clerk of the Circuit Court
Grenada County, Mississippi

PLEASE TAKE NOTICE that defendant desires to appeal his conviction and sentence in this cause rendered against him on January 27, 1969, to the Supreme Court of Mississippi, and therefore he respectfully requests and directs that, upon the posting of the necessary bond, you prepare and forward to the Supreme Court of Mississippi, the following:

The entire record in this cause including any and all transcribed notes, documents, orders and any and all contents of the record in this cause in its entirety.

Dated: February 6, 1969

MARTHA M. WOOD
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201
Attorney for Respondent

[Filed Feb. 6, 1969, Orley Lilly, Circuit Clerk.]

IN THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI

No. 3581

STATE OF MISSISSIPPI, PETITIONER

—*vs*—

ROBERT JOHNSON, RESPONDENT

NOTICE OF APPEAL TO THE OFFICIAL COURT REPORTER

OFFICIAL COURT REPORTER:

PLEASE TAKE NOTICE that the respondent, Robert Johnson, desires to appeal his conviction and sentence in this cause rendered against him on the 27th day of January, 1969, to the Supreme Court of Mississippi, and therefore respectfully prays and directs that, upon the posting of the necessary bond, you transcribe your notes, including your notes of any evidence at any hearings herein, and file the same with the Clerk of the Circuit Court of Grenada County, Mississippi.

February 6, 1969

MARTHA M. WOOD
MARTHA M. WOOD
233 North Farish Street
Jackson, Mississippi 39201
Attorney for Respondent

[Filed in my office this 6 day of February, 1969,
Orley Lilly, Clerk]

(Circuit Court of Grenada County, Mississippi)

APPEAL BOND

THE STATE OF MISSISSIPPI,)
Grenada County.)

Personally appeared before me, Orley Lilly Circuit Clerk in and for said County and State Lawrence E. Smith and Catherine Johnson Sureties to the foregoing bond, who being by me duly sworn, depose and say that they own, over and above all their legal liabilities, visible property subject to execution and not exempt by law from sale for debt:

The said Property of the value of Three hundred & no/100 Dollars,

The said Property of the value of Three hundred & no/100 Dollars,

The said Property of the value of Three hundred & no/100 Dollars,

/s/ Lawrence E. Smith
/s/ Catherine Johnson
/s/ Finley Johnson

Sworn to and subscribed before me, this 29th day of January 1969.

_____
Clerk

The foregoing Bond with the sureties thereto, examined and approved, this 29th day of January 1969.

/s/ Orley Lilly
Clerk
D. C.

No. ———

APPEAL BOND

Circuit Court of
Grenada County.

IN CASE OF
STATE OF MISSISSIPPI

vs.

ROBERT JOHNSON

Filed the ..... day of

..... 19...

..... Clerk

..... D. C.

APPEAL BOND TO SUPREME COURT

THE STATE OF MISSISSIPPI,)
Grenada County.)

KNOW ALL MEN BY THESE PRESENTS:

That we, Robert Johnson Principal, and Catherine Johnson & Lawrence E. Smith & Finley Johnson Sureties, are held and firmly bound unto The State of Mississippi in the penal sum of Three Hundred & No/100——— DOLLARS, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, the 29th. day of January A. D. 1969.

That condition of the above obligation is such, That, whereas, in a case lately pending in the Circuit Court of Grenada County, wherein The State of Mississippi was plaintiff, and Robert Johnson Defendant, a judgment was rendered on the 27th day of January 1969, a day of the January Term, 1969, of said Circuit Court of said County, in favor of said Robert Johnson was cited for Criminal Contempt committed in the presence of the Court and was sentenced to serve four months in the County Jail against said ..... and the said Robert Johnson conceiving ..... aggrieved thereby hath prayed for and obtained an appeal to revise and reverse said sentence returnable to the next Term of our Supreme Court.

Now, therefore, if the said obligators shall pay and satisfy the judgment of the Supreme Court and all costs of said appeal, and of the Court below, in case the judgment be affirmed, then this obligation to be void, otherwise to remain in full force and effect.

/s/ Robert Johnson (SEAL)
/s/ Lawrenee E. Smith (SEAL)
/s/ Catherine Johnson (SEAL)
/s/ Finley Johnson (SEAL)

[Filed Jan. 30, 1969, Orley Lilly, Circuit Clerk]

IN THE CIRCUIT COURT
OF GRENADA COUNTY, MISSISSIPPI

No. 3581

STATE OF MISSISSIPPI

—*vs.*—

ROBERT JOHNSON

APPEARANCE BOND

STATE OF MISSISSIPPI)
COUNTY OF GRENADA)

IN THE CIRCUIT COURT OF GRENADA COUNTY
TERM 1969

KNOW ALL MEN BY THESE PRESENTS, that we Robert Johnson Principal, and Catherine Johnson and Lawrence Smith Sureties, (1) residents of the State, (2) are held and firmly bound unto the State of Mississippi in the penal sum of $300, for which payment well and truly to be made, we jointly and severally, bind ourselves, our heirs, our executors, and administrators forever.

The condition of the foregoing obligation is such, that whereas, in the CIRCUIT Court of GRENADA County at the Term, on the 27th day of January defendant was convicted of criminal contempt and sentenced to imprisonment for four months, and the said Robert Johnson, feeling aggrieved by said conviction and judgment has prayed and obtained an appeal to the Supreme Court of Mississippi.

Now, if the said Robert Johnson shall appear in said Grenada County of Mississippi, and abide by and perform such sentence or judgment as may be rendered in the case, then this obligation be void; otherwise to remain in full force and effect.

GIVEN under our hands this 8th day of September, 1969.

/s/ Robert Johnson
Principal

/s/ Catherine Johnson
Surety

/s/ Lawrence E. Smith
Surety

Surety

Surety

The foregoing bond approved this 8th day of Sept., 1969.

/s/ Jesse A. Strider
Sheriff, Grenada Co.

STATE OF MISS.
COUNTY OF GRENADA:

I, the undersigned, hereby certify that I witnessed the signature of Robert Johnson on this the 8th day of Sept., 1969.

/s/ Turner M. Branford
Notary Public
My Commission Expires December 6, 1970

[SEAL]

[Filed Sep. 8, 1969, Orley Lilly, Circuit Clerk, By Florence Rogers]

IN THE CIRCUIT COURT
OF GRENADA COUNTY

Cause No. 8531

[Received & Filed Dec. 23, 1969, Julia H. Kendrick, Clerk, Yvonne Burnhem, D.C.]

IN RE: ROBERT JOHNSON

Contempt Proceeding

BILL OF EXCEPTIONS

COMES Robert Johnson, by his attorney Martha M. Wood, in the above styled and entitled cause, and takes a Special Bill of Exceptions pursuant to Sections 1152 and 1534 of the Mississippi Code of 1942, Recompiled, to the rulings of the Court, which rulings were made in the presence of Robert Johnson (insofar as hereinafter stated to be made in his presence), and at all times in the presence of Martha M. Wood and in open court. As and for the Special Bill of Exceptions:

I. *Necessary Background*

1. Robert Johnson (hereinafter "Respondent") was cited for criminal contempt of court while sitting, which was alleged to have been committed on January 23, 1967, at which time Respondent was present in the Circuit Court of Grenada County as a defendant in a pending criminal proceeding which has since been dismissed.

2. A summons ordering Respondent to show cause why he should not be punished for contempt of court was issued, together with a Petition signed by the County and District Attorneys reciting the alleged facts of such offense, both dated January 24, 1967, and both being part of the Circuit Court file herein.

3. A fiat signed by Circuit Court Judge Marshall Perry dated January 24, 1967, ordering Respondent to appear before the Circuit Court of Grenada County on February 1, 1967, to show cause why he should not be

punished for contempt of court is contained in the Circuit Court file herein.

4. A Petition for Removal of said cause to the United States District Court for the Northern District of Mississippi, Western Division, was filed on February 1, 1967. On November 19, 1968, said cause was remanded by the District Court to the Circuit Court of Grenada County. Said Petition and Order are part of the Circuit Court file herein.

5. On January 22, 1969, Respondent filed a suit entitled *Johnson et al.* v. *Gibbs et al.*, in the United States District Court for the Northern District of Mississippi, Western Division, No. WC 69-6 S, for preliminary and permanent injunctions prohibiting the trial of Negroes or women in the Circuit Court of Grenada County until such time as Negroes and women were not systematically excluded from the jury lists and venires of Grenada County in violation of the constitutional rights of Respondent, other plaintiffs and members of their class. A hearing was held before the Honorable Judge Orma R. Smith on January 24, 1969, and an order was entered granting a preliminary injunction pursuant to plaintiffs' request in that case on January 25, 1969. Judge Marshall Perry was a defendant in said case. A copy of said order is attached hereto as Exhibit A.

6. A summons was issued to Respondent, dated January 24, 1969, to appear in the Circuit Court of Grenada County on January 27, 1969, to show cause why he should not be punished for contempt of court allegedly committed on January 23, 1967.

II. *First Appearance Before Court*

7. At 9:00 A.M. on January 27, 1969, Respondent and his attorney, Martha M. Wood, a member in good standing of the Mississippi Bar, appeared before Judge Marshall Perry in the Circuit Court of Grenada County.

8. The first matter called by Judge Perry was the matter of Robert Johnson. Robert Johnson and Martha M. Wood approached the bench and the following transpired (there was no Court Reporter transcribing the proceedings):

(a) Judge Perry had in his hands a two page Order, a copy of which is attached hereto as Exhibit B, finding Respondent guilty of contempt of court, sentencing him to four months in the Grenada County jail and costs, and setting an appearance bond in the amount of $2000.

(b) Martha M. Wood at that time requested a hearing which request was denied.

(c) Martha M. Wood then objected to denial of a hearing on the contempt charge, and further objected that the sentence and bond exceeded the statutory limits for contempt.

(d) Judge Perry stated that he had intended to give Respondent a hearing on the contempt charge (as the court files ordering him to appear and show cause prove), but that since Respondent had the audacity to go to federal court (and whether Judge Perry meant by that the original removal order or the affirmative jury suit or both is not clear), he was not going to give him any hearing.

(e) Judge Perry further stated that the Mississippi statutes relating to contempt of court did not apply, and that he could set sentence and bond in any amount within his discretion.

III. *Second Appearance Before Court*

9. Later that morning, and at approximately 11:00 A.M., Judge Perry permitted Martha M. Wood to address the Court. Respondent was in jail and was not present.

10. Martha M. Wood stated in open court that section 1152 of the Mississippi Code of 1942, Recompiled, provided a maximum appearance bond in the case of contempt of the court while sitting of $300, and requested the court to reduce the bond from $2000 to within the statutory maximum. Judge Perry refused, denying the applicability of the statute.

11. Martha M. Wood stated in open court that section 1656 of the Mississippi Code of 1942, Recompiled, provided a maximum punishment for contempt of the

court while sitting of 30 days in the county jail and a fine of $100, and requested the court to reduce the sentence of Respondent to within the statutory maximum. Judge Perry refused, again denying the applicability of the statute.

12. Martha M. Wood further stated in open court that if Respondent were given the hearing to which he was entitled, that she expected to and would have done the following (each of the following points was made in open court, though not in the detail hereinafter set forth):

(a) Martha M. Wood would have made a motion to associate Lawrence Aschenbrenner, an expert in the field of criminal law, and an attorney in good standing of the Bars of the State of Oregon, the United States Supreme Court, the Fifth Circuit Court of Appeals and the United States District Courts for the Districts of Oregon and the Northern District of Mississippi. In support of said motion she would have introduced certificates of good standing; oral testimony by Mr. Aschenbrenner as to his qualifications and experience in the field of criminal law; and, oral testimony by Respondent that Mr. Aschenbrenner was counsel of his choice and that he wished for Mr. Aschenbrenner to be associated with Martha M. Wood in his defense.

(b) Martha M. Wood would have made a motion for a continuance of the hearing for contempt to a later day in the Term of Court. The January 1969 Term of Court was the first Term of Court since the within case was remanded to the Circuit Court. January 27, 1969, was the first day of the Term of Court and other than it being the first day and Respondent and his attorneys being aware that they had to appear on that day, no day certain was fixed for a hearing. Respondent needed such a day certain in order to subpoena a large number of witnesses, including several out of state witnesses whom he desired to subpoena under the Uniform Material Witnesses Act.

(c) Martha M. Wood would have made a motion to recuse Judge Marshall Perry, or in the alternative for a change of venue on the grounds:

(1) that contempt of court should not be tried before a judge who would be acting as judge, juror and prosecuting witness;

(2) That Judge Perry is unable to sit fairly and impartially in the case of Respondent in that he is biased and prejudiced against Negroes and civil rights workers, and he knows that Respondent is a Negro and a civil rights worker;

(3) That Judge Perry is unable to sit fairly and impartially in the case of Respondent in that he is biased and prejudiced against civil rights lawyers, and he knows that Respondent's attorneys are civil rights lawyers; and

(4) That Respondent would have the right to and would call Judge Marshall Perry as an essential witness in his hearing for contempt.

All of the above grounds (1) through (4) would have been supported by documentary evidence and the testimony of numerous witnesses.

(d) Martha M. Wood would have demurred to the Petition citing Respondent for contempt of court in that it failed to state facts sufficient to constitute a contempt of court under Mississippi law.

(e) Martha M. Wood would have made a motion for a jury trial on the grounds that Respondent was entitled to a jury trial under Article 3, Section 26 of the Mississippi Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

(f) Martha M. Wood would have proven on the merits of the contempt charge that Respondent was not guilty of direct or constructive contempt of court under state or federal law. Proof on the merits would have come from a large number of witnesses who were spectators in the courtroom on the day the alleged contempt occurred and also from testimony by Judge Marshall Perry.

(g) Martha M. Wood would have proven, if Respondent were found guilty of contempt, facts in mitigation of sentence.

13. Judge Perry stated that Respondent was not entitled to a hearing and that he did not want to hear

about what Respondent would have proved if given the opportunity.

14. Martha M. Wood called to the attention of the court section 1152 of the Mississippi Code of 1942, Recompiled, which provides that the Judge shall sign a bill of exceptions within one day, if demanded, and requested the court for an extension of time within which to file such a Bill of Exceptions. Judge Perry stated that section 1152 of the Mississippi Code of 1942, Recompiled did not apply in the instant case, that Respondent was not otherwise entitled to a Bill of Exceptions, and that he would in no case sign a Bill of Exceptions for Respondent.

15. Attorneys Jon Thames and Robert Kelly, both of whom are members in good standing of the Mississippi Bar, were in the Circuit Court of Grenada County on court business on January 27, 1969, and were at all times relevant hereto present in the courtroom, and can swear to the substance of the exceptions taken in Parts II and III hereof. Neither attorney is related to the Respondent or his attorneys herein or is in any manner interested in this case.

IV. *Conclusion*

The exceptions stated in Parts II and III hereof were tendered in open court and in the presence of Judge Marshall Perry, attorneys Martha M. Wood, Jon Thames and Robert Kelly, and in the presence of Respondent Robert Johnson as to the exceptions stated in Part II only. Judge Marshall Perry refused in open court to sign any Bill of Exceptions, and denied the applicability of statutes so requiring. Therefore this Bill was not tendered to Judge Perry for signature. This Bill is instead being signed by Respondent's attorney and two attorneys who were present in the court at the time the matters set forth in Parts II and III hereof transpired. Affidavits of each of the attorneys and of Respondent Robert Johnson are attached hereto.

WHEREOF, the above exceptions having been duly tendered, Respondent prays that the contempt conviction

be vacated and Respondent discharged or, in the alternative, that he be given a hearing on said contempt charge.

Respectfully submitted,

/s/ Martha M. Wood
MARTHA M. WOOD
Lawyers' Committee for Civil Rights Under Law
233 North Farish Street
Jackson, Mississippi 39201
Attorney for Respondent

/s/ Jon Thames
JON THAMES
Northern Mississippi Rural Legal Services Program
108½ South Lamar Street
Oxford, Mississippi 38655

/s/ Robert J. Kelly
ROBERT KELLY
Northern Mississippi Rural Legal Services Program
108½ South Lamar Street
Oxford, Mississippi 38655

STATE OF MISSISSIPPI
GRENADA COUNTY

I, Orley Lilly, Circuit Clerk in and for said state and county, do hereby certify that the above and foregoing is true and correct copy of Bill of Exceptions as the same now appears of record in Circuit Clerk's Records of my office.

Given under my hand seal of office, this the 22nd day of December, 1969.

ORLEY LILLY
Cir. Clk.
By /s/ Florence Rogers
D. C.

SUPREME COURT OF MISSISSIPPI

Monday, March 9, 1970 Court Sitting:

45,743

ROBERT JOHNSON

vs.

STATE

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Grenada County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this cause on the 27th day of January 1967— be affirmed as hereinafter modified. That part of the judgment dealing with direct contempt is affirmed, however, the sentence imposed exceeded the maximum prescribed by statute for direct contempt and the judgment is modified and appellant is sentenced to thirty days in jail, and as so modified the cause is affirmed. It is further ordered and adjudged that the State of Mississippi do have and recover of and from the appellant and Lawrence E. Smith, Catherine Johnson and Finley Johnson, sureties on the appeal bond herein, all of the costs of this appeal to be taxed, for which let proper process issue.

Minute Book "BP" Page 79

IN THE SUPREME COURT OF MISSISSIPPI

No. 45,743

ROBERT JOHNSON

v.

STATE OF MISSISSIPPI

INZER, JUSTICE:

Appellant, Robert Johnson, was convicted for direct contempt in the Circuit Court of Grenada County and was sentenced to serve four months in the county jail. From this conviction and sentence he appeals to this Court.

The facts which led to his conviction are set out in the order of the circuit court. The essential part is as follows:

> That on the morning of January 23, 1967, on the opening day of the regular January, 1967, term of this Court, at approximately ten minutes after nine o'clock the within Robert Johnson (he being at that time a defendant in a criminal case pending in said Court), entered the court room at a time when Court was in session and jurors were being called. The Judge had previously that morning in open court made the announcement that all persons entering the court room that morning were to walk along the aisle near the side wall leading from the door, going toward the back of the room and then find seats anywhere in the room outside the space reserved for jurors and county officers, and the court especially emphasized that no person was to walk between this reserved section and the Judge while jurors were being called. The purpose of this rule was to help expedite the work of the court and make for more orderly proceeding. All Bailiffs and Deputies on duty were instructed to enforce this rule and to instruct all persons entering the room after the announcement was made in open court.

When said Robert Johnson (hereinafter called defendant) entered the court room, as above stated and after said rule had been announced, the Deputy Sheriff stationed near said door (Mr. Aaron Lott) instructed the defendant as to said rule and told him to go down said aisle toward the back; whereupon said defendant, in a loud and defiant tone of voice which was heard by many people throughout the court room and was heard by the Judge, said: "What the hell do you mean go around." Said Johnson, defendant, then continued to stand and look around over the room, disrupting the court proceedings. The Sheriff and another Deputy, on order of the Court, arrested said Johnson and brought him before the Bench. The Court advised said defendant that he was in contempt and would be sentenced later during the court term.

About two or three days later, during that same week and before the Court had imposed sentence and judgment in this matter, a petition was filed on behalf of said defendant by his attorney in the United States District Court at Oxford, Mississippi, the effect of which was to remove said case out of the hands and control of the within State Court, temporarily and pending action thereon by said federal court. By order of the said U. S. District Court, dated November 14, 1968, the said case was returned to the Circuit Court of Grenada County, Mississippi. Upon being informed by the Clerk of said action by the Federal Court, this Court proceeded in vacation to order within defendant to post a bail bond to guarantee his appearance at the first day of the next regular term of court, which date was January 27, 1969. The said defendant posted said bail bond without being placed in custody.

That this Court now has jurisdiction of both the defendant and the subject matter, and the authority to enter this sentence and judgment, this Court having inherent power to punish for criminal contempt.

> Wherefore, it is hereby ordered and adjudged that said Robert Johnson, within defendant, is hereby adjudged in criminal contempt, and for said direct contempt done and committed in open court and in the presence of the Judge and Court, is hereby sentenced to serve a term of four months in the Grenada County jail and pay all court cost in this matter.

The record reflects that shortly after appellant had been informed that he was in contempt of court, the court requested the district attorney and the county attorney to file a formal petition citing appellant to appear and show cause why he should not be punished for his contempt. The petition was duly filed and appellant was cited to appear on February 1, 1967, to show cause. Appellant did not file an answer to this petition but did file a motion for the judge to recuse himself. The basis for this motion was that the judge was prejudiced against the appellant because of his civil rights activities and against civil rights attorneys, one of whom represented appellant. After the cause was remanded to the state court, and appellant was again cited to appear he did not file an answer in response to the citation, but did appear in court with his attorney whereupon he was sentenced for his contempt. Appellant then filed a bill of exceptions which was signed by two attorneys who were present in court when appellant was sentenced.

In considering this case there are certain basic principles that must be kept in mind. Appellant was found guilty of direct contempt of court. The circuit court not only had the inherent power to punish for such contempt, but also is authorized by Section 1656, Mississippi Code 1942 Annotated (1956) to fine and imprison any person guilty of contempt of court while the court is sitting. This section limits the punishment to a fine of $100 and imprisonment to continue no longer than thirty days. It is well settled that for a direct contempt the offender may be punished instantly without the necessity of any proof. The judge may act upon what he has seen and

heard. No formal written information of contempt is required, but the judgment of guilt must set out the substantive acts constituting the contempt. Wood v. State, 227 So. 2d 288 (Miss. 1969); Brannon v. State, 202 Miss. 571, 29 So. 2d 916 (1947).

Upon appeal to this Court from a conviction of direct contempt the statement of the substantive facts set out in the judgment of the trial court will be taken as true and correct. Turner v. State, 121 Miss. 68, 83 So. 404 (1920); Gurley v. State, 101 Miss. 190, 57 So. 565 (1912).

Upon review by this Court the question is whether the appellant is guilty of contempt, this determination must be made from the facts set out in the judgment. This Court is not bound by the general rule that we will not reverse unless the trial court is manifestly wrong and we may affirm, reverse, annul or modify the order of conviction as justice may demand. Section 1152, Mississippi Code 1942 Annotated (1956); Bucklew v. State, 209 So. 2d 916 (Miss. 1968).

Appellant assigns several grounds for the reversal of this case but we will only discuss those which we deem merit discussion.

The first and principal contention of appellant is that the procedure by which appellant was convicted violated the Fourteenth Amendment to the Constitution of the United States because appellant was denied any form of a hearing. Appellant cites and relies upon the case of *In re Oliver*, 333 U. S. 257, 683 S. Ct. 499, 92 L. Ed. 682 (1948). This case involved constructive contempt and not direct contempt. The court in *Oliver* pointed out that the exception to the rule requiring notice and a hearing was a situation such as we have in this case before us. The court said:

> The narrow exception to these due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and

where immediate punishment is essential to prevent "demoralization of the court's authority" before the public. (333 U. S. at 275, 68 S. Ct. at 509, 92 L. Ed. at 695).

The trial judge observed appellant's disorderly conduct and immediately ordered appellant to be arrested and brought before him. He informed appellant that he was guilty of contempt and that he would be sentenced later in the term. Apparently, the reason for the delay in imposing the sentence at that time was due to the fact that appellant was a defendant in a case pending for trial at that term of the court. It was not necessary for the court to have the district attorney and the county attorney to file a formal petition asking that appellant be cited for contempt, and the fact that it was filed and appellant was cited did not entitle appellant to a hearing on the question of his guilt. The only answer that the court was required to hear was any answer that appellant might have desired to make in mitigation of the punishment to be imposed. Instead of answering, appellant filed his petition for removal. When the case was remanded to the state court nearly two years later the only way that the court could be assured that the appellant would be before the court was by requiring him to post bail bond for his appearance. This was accomplished with another citation.

Appellant urges that the long delay from the time of the offense until the time punishment was imposed should entitle him to a hearing on the question of whether he was guilty of direct contempt. The delay was caused by removal to the federal court. There was nothing that the trial court could do about imposing punishment until the case was remanded. When it was remanded it was in the same status as it was prior to removal. The most that appellant was entitled to before punishment was imposed was to make any statement he desired in the way of contrition or apology.

A contemnor cannot by a bill of exceptions purge himself of direct contempt of court. The only function of a bill of exceptions in a direct contempt case is to

get before this Court any statement that the contemnor may have made to the trial court relative to an apology or to show contrition for his act, in amelioration of punishment. In this case appellant had this opportunity to file a written answer to the citation wherein he could have set up any matter that he desired by way of apology or contrition. We hold that appellant was not entitled to a hearing on the question of whether his acts and words constituted direct contempt, and in view of the fact that appellant was afforded an opportunity to answer the petition requiring him to show cause, it was not error for the trial court to impose punishment without giving appellant an opportunity to be heard. Ex parte Redmond, 156 Miss. 582, 126 So. 485 (1930).

Appellant assigns as error the failure of the trial judge to grant him a hearing on his claim that the trial judge was biased and prejudiced because of racial prejudice. This raises the question of whether a claim of disqualification of the judge in whose court a direct contempt was committed will be heard. We have not been able to find any decision of this Court on this precise point. An examination of authorities reveals that practically all courts hold that such claim will not lie. One of the cases so holding is *Blodgett* v. *Superior Court*, 290 P. 293, 210 Col. 1 (1930) wherein that Court said:

> This brings us directly to the next question submitted by the petitioner for our consideration which is as to whether upon a hearing on a charge of the commission of direct contempt the person charged with such commission is entitled to urge that disqualification of the judge in and against whose court the offense was committed, under the provisions of Section 170 of the Code of Civil Procedure. Upon this question the authorities are practically uniform, not only in this state, but all over the country, to the effect that a person charged with the commission of a direct contempt and subject to be summarily punished therefor may not be heard to urge the disqualification of the judge about to adjudge the party guilty of such direct contempt.

The leading case in this country upon that subject is that of In re Terry, 128 U. S. 289, 9 S. Ct. 77, 80, 32 L. Ed. 405 (1888), wherein, after a review of many authorities, the Supreme Court of the United States held that the power immediately to punish an offender for a direct contempt is, and from the most ancient times has been, an inherent power, upon the recognition and enforcement of which "depend the existence and authority of the tribunals established to protect the rights of the citizens, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals, * * * Blackstone thus states the rule: 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges without any further proof or examination.'" And the court further quotes from Bacon's Abridgment, title Courts, E, wherein it is laid down that: "Every court of record as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge. * * * and immediately order them into custody." The federal tribunals have uniformly applied the rule to cases before them to the extent of holding that a person charged with a direct contempt is not entitled to apply for a change of venue on the ground of the bias and prejudice of the judge. Eilenbecker v. Plymouth, County, 134 U. S. 31, 10 S. Ct. 424, 33 L. Ed. 801; (1890); Bessette v. Conkey Co. 194 U. S. 324, 24 S. Ct. 665, 48 L. Ed. 997; Fleming v. U. S. (C.C.A.) 279 F. 613. The state courts in other jurisdictions have also, with like uniformity, declared it to be the rule as stated in State v. Bland, 189 Mo. 197, 88 S. W. 28, 31, 3 Ann. Cas. 1044, that "It is settled law that contempt cases are sui generis, that one

court may not try a case of contempt against another, that contempt proceedings are summary, that there is no constitutional right to trial by jury, and that no change of venue will lie." See also, in re Cooper, 32 Vt. 253; State v. Woodfin, 27 N. C. 199, 42 Am. Dec. 161; Ex parte McCown, 139 N. C. 95; 104; 51 S. E. 957; 2 L.R.A. (N.S.) 603; Coons v. State, 191 Ind. 580; 134 N. E. 194; 20 A.L.R. 900; Dale v. State, 198 Ind. 110; 150 N. E. 781; 49 A.L.R. 647; Noble v. Aasen, 10 N. D. 264, 86 N. W. 742; Tucker v. State, 35 Wyo. 430; 251 P. 460; State v. Shepherd, 177 Mo. 205; 76 S. W. 79, 99 Am. St. Rep. 624; State v. Clancy, 30 Mont. 193; 76 P. 10 and many others. (290 P. at 296, 297).

We adopt this rule that a claim of disqualification of a trial judge is not a proper plea where the contempt is direct and hold that appellant was not entitled to have his claim of disqualification heard in this case.

On the question of whether appellant was guilty of direct contempt we are of the opinion that the trial judge was justified in finding appellant guilty of contempt. In Neely v. State, 98 Miss. 816, 54 So. 315 (1911), in defining direct contempt it was pointed out "misconduct in the presence of the court which shows a disrespect of its authority or which obstructs or has a tendency to interfere with due administration of justice is contempt. Thus, any disorderly conduct or use of violence or threatening language to the court is contempt." In passing upon the question of whether the disorderly conduct of appellant constituted direct contempt, we recognize that the trial judge was in a much better position to determine this question than we are from the record. The trial judge not only heard the words spoken, the tone of the voice in which spoken, but also observed the actions of appellant before and after speaking the words. He was in a position to judge whether the appellant intended to show contempt for the court and its officers. Certainly this type of conduct, if permitted, would cause those observing it to lose respect for the court. It interfered with the business of

the court then being conducted. The disorderly conduct of appellant cannot be condoned.

We hold that the facts set out in the judgment of the circuit court are sufficient to show that appellant was guilty of direct contempt of that court and that part of such judgment is affirmed. However, the sentence imposed exceeded the maximum prescribed by statute for direct contempt and the judgment will be modified to impose a sentence of thirty days in the county jail. The judgment as modified will be affirmed.

AFFIRMED AS MODIFIED.

GILLESPIE, JONES, BRADY AND ROBERTSON, JJ., CONCUR.

(SUPREME COURT OF MISSISSIPPI)

Monday, April 6, 1970.

45,743

ROBERT JOHNSON

vs

STATE

This cause this day came on to be heard on the petition for a rehearing filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be denied doth order and adjudge that said petition be and the same is hereby denied.

Minute Book "BP". Page 96

(SUPREME COURT OF MISSISSIPPI)

Monday, April 27, 1970, Court Sitting.

45,743

ROBERT JOHNSON

vs.

STATE

ORDERED: The Motion to Stay Final Judgment is sustained upon appellant filing an appearance bond in the penal sum of $300.00 and a cost bond in the penal sum of $300.00 and provided a petition for certiorari is timely filed.

Minute Book "BP", Page 113

(Circuit Court of Grenada County, Mississippi)

[Received & Filed Feb. 9, 1970, Julia H. Kendrick, Clerk, Yvonne Burnhem, D.C.]

IN RE: CONTEMPT PROCEEDINGS AGAINST ATTORNEYS MARTHA M. WOOD, JON THAMES AND ROBERT J. KELLY.

The within matter came before the Court in open session at the regular January 1969 term thereof, and the Court finds and adjudicates as follows:

That on the first day of the within term of this Court, being Monday, January 27, 1969, this Court sentenced one Robert Johnson for a criminal contempt committed in the presence of the Court and while the Court was transacting business and in regular session. The said order and judgment is of record in Minute Book 11, page 281 and is herewith by reference made a part of this order and judgment. The said judgment of contempt speaks for itself and sets out all the facts and no oral statement was made by the Court except to quote from the judgment as it appears in the minutes.

On this February 6, 1969, while Court was in session and transacting business there came one Martha M. Wood, an attorney, and presented a lengthy petition or instrument which is termed a "Bill of Exceptions," the same having been signed by her and by attorneys Jon Thames and Robert J. Kelly. The Court having read the said instruments finds and adjudicates that the same is filled with calculated, deliberate falsehoods and misstatements of fact and is grossly disrespectful to this Court and contains language that no attorney should be permitted to use in an instrument filed in Circuit Court. Among other things, on page 3 thereof is contained the following language under Section 8, paragraph (d):

"Judge Perry stated that he had intended to give Respondent a hearing on the contempt charge (as the court files ordering him to appear and show cause prove), but that since Respondent had the audacity to go to federal court (and whether Judge Perry meant by that the original removal order or the affirmative jury suit or

both is not clear); he was not going to give him any hearing."

The Court states and adjudicates that nothing of that kind was said by the Court, that the said paragraph (d) is a falsehood from beginning to end, that no federal proceedings have influenced the Court in this matter and that said attorneys are guilty of gross infidelity to the Court and violation of their oaths as attorneys.

On page 5 of said instrument under paragraph (c), subparagraphs 1, 2, 3, and 4, are grossly disrespectful to the Court and constitute unprofessional conduct and contempt. Said paragraphs are as follows:

"(1) That contempt of court should not be tried before a judge who would be acting as judge, juror and prosecuting witness;

"(2) That Judge Perry is unable to sit fairly and impartially in the case of Respondent in that he is biased and prejudiced against Negroes and civil rights workers, and he knows that Respondent is a Negro and a civil rights worker;

"(3) That Judge Perry is unable to sit fairly and impartially in the case of Respondent in that he is biased and prejudiced against civil rights lawyers, and he knows that Respondent's attorneys are civil rights lawyers; and

"(4) That Respondent would have the right to and would call Judge Marshall Perry as an essential witness in his hearing for contempt."

Said instrument is ordered preserved as a part of the file in this cause, same being given the same cause number as the Robert Johnson contempt proceeding; which is No. 3581.

After reading said petition which was presented by the said Martha M. Wood in open Court and considering the within matter, this Court finds and adjudicates as follows:

For the conduct of said attorneys, as aforesaid, and the willful misrepresentation of facts as to what they allege occurred when all three of said attorneys were present in Court, for the disrespectful language to the Court, for the gross lack of fidelity to the Court and

their attitude as shown by said instrument, it is ordered and adjudged that each of said parties, Martha M. Wood, Jon Thames, and Robert J. Kelly, are adjudged in criminal contempt and each of them are sentenced to serve a term of sixty days in the County Jail and pay a fine of $300.00.

It is further ordered and adjudged that the Clerk of this Court be and he is hereby directed to send a certified copy of this order to the Chairman of the Complaints Committee of the Mississippi State Bar Association, and the said Committee is requested to take whatever action is deemed proper after an investigation thereof.

So ordered and adjudged in open Court, this the 6th day of February, 1969.

/s/ Marshall Perry
Circuit Judge

IN THE SUPREME COURT OF MISSISSIPPI

No. 45,743

[Received & Filed Jun. 18, 1970, Julia H. Kendrick, Clerk, Yvonne Burnhem, D.C.]

ROBERT JOHNSON, APPELLANT

vs.

STATE OF MISSISSIPPI, APPELLEE

MOTION TO CERTIFY RECORD AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Appellant, by his attorney, respectuflly petitions this Court to prepare, certify and transmit the record in this cause to the Clerk of the Supreme Court of the United States without prepayment of costs, in forma pauperis, and as grounds therefor would show:

1. On April 6, 1970, this Court denied appellant's Petition for Rehearing of the above-entitled case, in which appellant's conviction of contempt was affirmed as modified on March 9, 1970;

2. Appellant, by his attorneys Stephen W. Porter, Esquire and Richard B. Ruge, Esquire, of Washington, D. C. intends to file in the Supreme Court of the United States a Petition for a Writ of Certiorari to review the judgment denying appellant's Petition for Rehearing, together with a motion for leave to proceed in forma pauperis in that Court;

3. On April 27, 1970, this Court granted appellant's Motion for Stay of Judgment pending disposition of the Petition for a Writ of Certiorari to be filed in the Supreme Court of the United States;

4. Appellant accordingly moves this Court to prepare, certify, and transmit to the Clerk of the Supreme Court of the United States, a copy of the entire record that was before this Court including the Court's order denying appellant's Petition for Rehearing entered April 6, 1970; appellant's Petition for Rehearing filed herein; this Court's opinion and judgment of March 9, 1970, in which appellant's conviction was affirmed as modified; briefs filed by appellant and by respondent in this case; appellant's Bill of Exceptions; order adjudging Robert Johnson in contempt and providing punishment, etc., of Judge Marshall Perry dated January 27, 1969; appellant's Motion to Recuse filed in the Circuit Court on January 27, 1957; and all such other material constituting the entire record that was before this Court;

5. Appellant further moves this Court for leave to have said record certified and transmitted to the Clerk of the Supreme Court of the United States without prepayment of costs, and in forma pauperis. Appellant's affidavit in support of this motion is attached hereto.

Respectfully submitted,

/s/ Constance Iona Slaughter
CONSTANCE IONA SLAUGHTER
Lawyers' Committee for Civil
Rights Under Law
233 North Farish Street
Jackson, Mississippi 39201

Attorney for Appellant

IN THE SUPREME COURT OF MISSISSIPPI

No. 45,743

[Received & Filed Jun. 18, 1970, Julia H. Kendrick, Clerk, Yvonne Burnhem, D.C.]

ROBERT JOHNSON, APPELLANT

v.

STATE OF MISSISSIPPI, APPELLEE

AFFIDAVIT IN SUPPORT OF MOTION TO CERTIFY RECORD AND FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Robert Johnson, being first duly sworn according to law, depose and say, in support of my motion to certify record and for leave to proceed without being required to prepay costs or fees:

1. I am the appellant in the above-entitled cause.
2. Because of my poverty I am unable to pay the costs or fees of certifying and transmitting the record in said cause.
3. I am unable to give security for same.
4. I believe that I am entitled to the redress I seek with respect to said cause.
5. The nature of said cause is briefly stated as follows:

On January 27, 1969, I was sentenced by Judge Marshall Perry of the Circuit Court of Grenada County, Mississippi, to four months' imprisonment for criminal contempt of Court alleged to have occured on January 23, 1967. On appeal, this Court modified the sentence to thirty days' imprisonment, the statutory maximum under Miss. Code 1942, § 1656 ("contempt of the court while sitting"). Petition for rehearing was denied by this Court on April 6, 1970. The basic ground asserted for reversal is that my conviction violated the due process clause of the Fourteenth Amendment to the United States Constitution, in that I was denied the right to

make legal objections to the show-cause petition citing me for contempt, the right to a hearing on the issue of my guilt or innocence, the right to present facts in mitigation of sentence, and the right to a hearing on the motion that Judge Perry recuse himself from judging the contempt charge.

/s/ Robert Johnson
ROBERT JOHNSON

STATE OF GEORGIA)
) SS
COUNTY OF FULTON)

Subscribed and sworn to before me this 8th day of June, 1970.

/s/ Alice M. Leuis
Notary Public

My commission expires June 23, 1972.

CERTIFICATE OF SERVICE

I certify that I have this day mailed, postage prepaid, a copy of the foregoing motion and supporting affidavit to Honorable Guy Rogers, Assistant Attorney General, New Capitol Building, Jackson, Mississippi, attorney for appellee.

This the 17th day of June, 1970.

/s/ Constance Iona Slaughter
CONSTANCE IONA SLAUGHTER

SUPREME COURT OF THE UNITED STATES

No. 5485, October Term, 1970

ROBERT JOHNSON, PETITIONER

v.

MISSISSIPPI

On petition for writ of certiorari to the Supreme Court of the State of Mississippi.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 11, 1971

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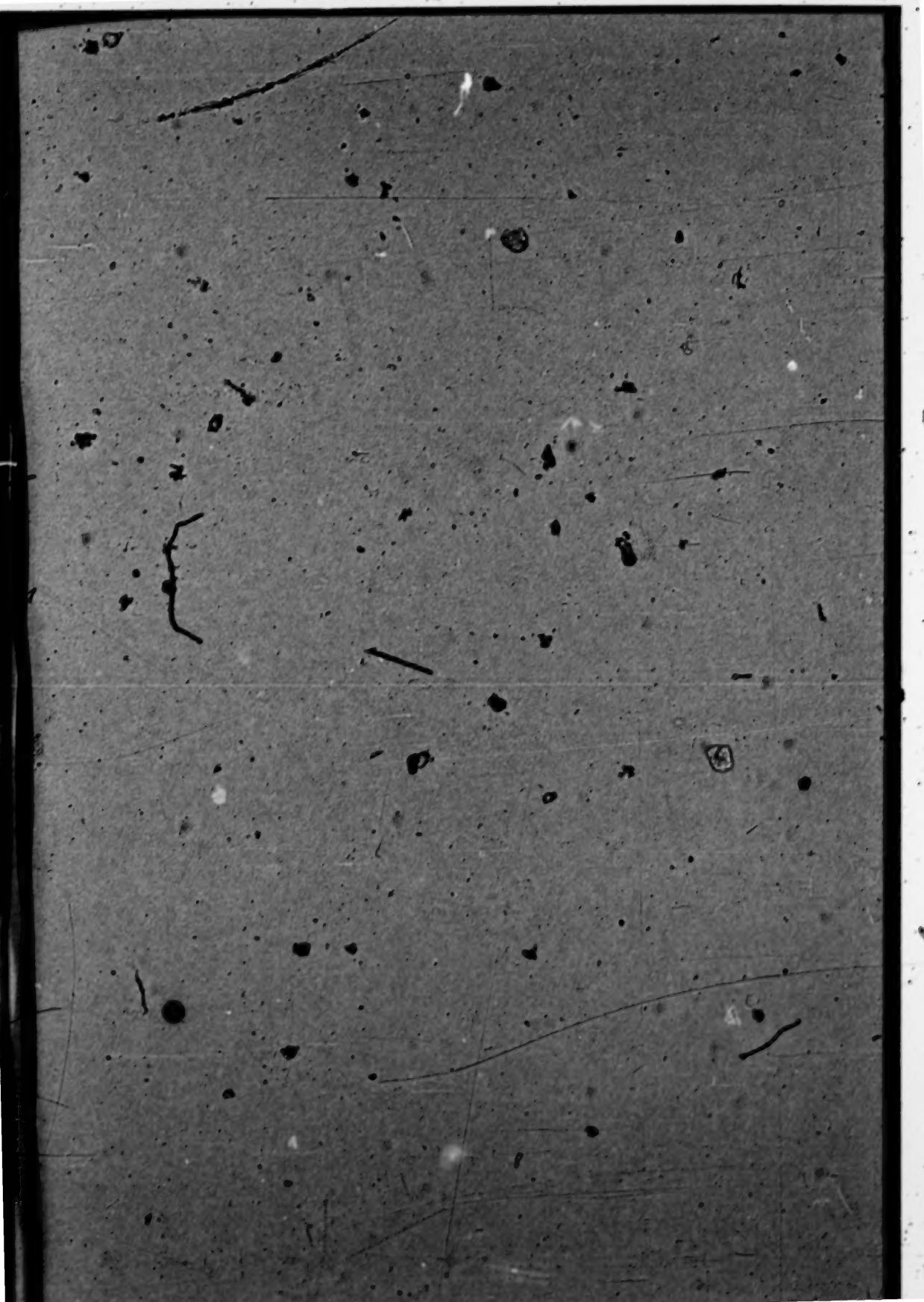

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5485

ROBERT JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5485

ROBERT JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The order "adjudging Robert Johnson in contempt and providing punishment, etc." issued by Judge Marshall Perry of the Circuit Court of Grenada County, Mississippi, on January 27, 1969, is unreported and is printed at Single Appendix (A.) 28. The opinion of the Supreme Court of Mississippi dated March 9, 1970, affirming Johnson's conviction as modified, is reported at 233 So.2d 116 and is printed at A. 46. The judgment of the Supreme Court of Mississippi denying Johnson's petition for rehearing was entered April 6, 1970, and is printed at A. 55.

JURISDICTION

The judgment (A. 45) and opinion (A. 46) of the Supreme Court of Mississippi were rendered on March 9, 1970. Petitioner filed a timely petition for rehearing in that court which was denied on April 6, 1970 (A. 55). The petition for a writ of certiorari was filed on July 2, 1970, and granted on January 11, 1971 (A. 62). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States provides in part:

> In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides in part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED

1. Did the Mississippi trial court violate petitioner's right to due process by summarily convicting him of criminal contempt

> —where the court, although not immediately invoking summary procedure, some two years later denied petitioner the opportunity to assert legal or factual defenses to the contempt charge;
>
> —where the actual use by the court of an alternative remedy (ouster from the courtroom) made summary proceedings unnecessary;

—where all necessity for a factual hearing had not been excluded; and

—where petitioner's one remark to courtroom sheriffs did not constitute a "flagrant defiance" of the court.

2. Did the failure of the trial judge—whose role as dispassionate jurist was entangled with his roles as the official who initiated the prosecution, and as a defendant in a law suit brought by petitioner—to disqualify himself or even to hear petitioner's motion to recuse deprive "the contempt proceeding of the appearance of evenhanded justice which is at the core of due process"?

STATEMENT

On January 27, 1969, Petitioner, Robert Johnson, without a hearing, was summarily convicted of criminal contempt by Judge Marshall Perry of the Circuit Court of Grenada County, Mississippi, for a remark Johnson allegedly made more than two years earlier in Judge Perry's courtroom (A. 28). Judge Perry sentenced Johnson to four months' imprisonment (A. 29). This sentence was reduced by the Supreme Court of Mississippi to the maximum sentence (one month) authorized by Mississippi statute for "contempt of the court while sitting."[1] On April 27, 1970, the Supreme Court of Mississippi granted Johnson's motion for stay of judgment pending disposition in this Court of the petition for a writ of certiorari (A. 55).

Although Judge Perry had twice scheduled a show-cause hearing on the contempt charge, at Johnson's conviction and sentencing he was denied, over objection (A. 39-43), any opportunity

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[1] Miss. Code 1942, § 1656 provides in part: "The Supreme, circuit, chancery and county courts shall have power to fine and imprison any person guilty of contempt of the court while sitting, but the fine shall not exceed one hundred dollars for each offense, nor shall the imprisonment continue longer than thirty days."

—to be heard on the issue of his guilt or innocence;

—to be heard on his previously filed motion (A. 6) that Judge Perry recuse himself from judging the contempt charge;

—to assert legal defenses to the show-cause petition (A. 3) citing him for contempt; or

—to present facts in mitigation of sentence.

The alleged contempt occurred on January 23, 1967, under the following circumstances.

At the 9 a.m. opening of Judge Perry's court on January 23, 1967 (the first day of the January term), prospective jurors occupied the rows of benches nearest the courtroom doors, a section normally reserved for the public (A. 3, 15). The arrangement of the courtroom was such that a direct route from the doors to the remaining seats reserved for the public and for defendants in pending cases involved walking in front of the prospective jurors (A. 15). Judge Perry, to forestall persons from taking that path, announced at the opening of court (9 a.m.) that those entering the courtroom should use an aisle running behind the jurors to reach the remaining seats (A. 3, 15, 28).

Around 9:05 or 9:10 a.m. (A. 3, 28), subsequent to Judge Perry's announcement, Johnson entered through the courtroom doors and began walking across the room to sit with some persons he knew, namely, other civil rights workers present (like Johnson) as defendants in pending cases[2] (A. 15-16). As he did so, he passed in front of the jurors seated near the doors (A. 3, 16).

At that point, Deputy Sheriff Aaron Lott apprehended Johnson and instructed him to turn around and walk to the rear of the courtroom (A. 3, 16, 28). According to the show-cause petition citing Johnson for contempt, Sher-

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[2]The charges pending against Johnson were subsequently dismissed (A. 38). At that time, Johnson was a 20-year-old civil rights worker employed as a staff member of the Southern Christian Leadership Conference (A. 6, 14).

iff Suggs Ingram immediately joined Deputy Lott and also ordered Johnson to the rear of the courtroom (A. 3). Thereupon, the petition continues, "Robert Johnson said in a loud and offensive voice, 'what the hell do you mean go around' " (A. 3).

By contrast, Johnson has asserted that not having heard Judge Perry's earlier announcement, he simply asked for an explanation of the orders of the deputy and sheriff (A. 16). Johnson was never given a hearing at which he could have called witnesses or otherwise substantiated his version of the events, and there is no transcript of the proceedings in Judge Perry's courtroom on January 23, 1967.

Differing and contradictory versions of the events which followed Johnson's alleged remark appear in the State's own documents included in the "record" which the Supreme Court of Mississippi considered in affirming the contempt conviction. These versions appear in the State's show-cause petition citing Johnson for contempt which was signed January 24, 1967, *the day following the events,* by both the Grenada County prosecuting attorney and the local district attorney (A. 3-4), and in Judge Perry's contempt judgment of January 27, 1969, *first prepared two years after the events* (A. 28-29):

> 1. The State's 1967 show-cause petition reports that following Johnson's remark, Sheriff Ingram and Deputy Sheriff Howard Hayward seized Johnson "and immediately carried him before the Circuit Judge, Marshall Perry, *and related to the Judge what had transpired.*" (Emphasis added.)[3] Differing

[3]Sheriff Suggs Ingram, one of the officers who "related to the Judge what had transpired," was a defendant in a 1966 civil rights suit in which Johnson was chief witness for the plaintiffs (see Rebuttal Brief for Appellant Johnson at 11, *Johnson v. State,* 233 So.2d 116 (Miss. 1970), part of the certified record p eviously filed herein with the petition for certiorari). In that action, *Cunningham v. Ingram,* 12 Race Rel. L. R. 53 (N.D. Miss. No. WC 6630, 1966), the U.S. District Court for the Northern District of Mississippi found that the defendants had caused "arrests and other acts . . . which, in some

sharply, Judge Perry's 1969 contempt order declares that he learned of Johnson's one remark to Sheriff Ingram and Deputy Lott near the courtroom doors not because the officers repeated it to him at the bench but because he overheard it himself.

2. The 1967 show-cause petition states that after the officers had brought Johnson to the bench and had "related to the Judge what had transpired", Judge Perry "*then* instructed the Sheriff to arrest Robert Johnson for contempt of Court : . . ." (Emphasis added.) By contrast, Judge Perry's 1969 contempt order avers that "on order of the Court," the sheriff and a deputy "arrested said Johnson and brought him before the Bench."

3. The 1967 show-cause petition states that Judge Perry, having "instructed the Sheriff to arrest Robert Johnson for contempt of Court", then "requested that the District Attorney and the County Prosecuting Attorney file a petition citing and requiring Robert Johnson *to show cause why he should not be punished for a contempt* of the Circuit Court of Grenada County, Mississippi." (Emphasis added.) Ignoring this indisputable fact, Judge Perry's contempt order, first prepared in 1969, recites that the Court at that time "advised said defendant *that he was in contempt* and would be sentenced later during the court term." (Emphasis added.)

4. Judge Perry's 1969 contempt order adds that after Johnson's remark to Sheriff Ingram and Deputy Lott, Johnson "continued to stand and look around over the room, disrupting the court proceedings."

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instances, infringed upon" plaintiffs' Constitutional rights, and therefore enjoined Sheriff Ingram and other defendants from "arresting, jailing, prosecuting, punishing, threatening, intimidating, deterring, blocking or in any way interfering with plaintiffs or the members of the class they represent [Negro citizens of Grenada County] while they are engaged in exercising rights guaranteed and protected by the First and Fourteenth Amendments to the United States Constitution . . . ." In addition to Sheriff Ingram, the defendants included the Grenada County prosecuting attorney, Jim McRae Criss, Esq., who signed the 1967 show-cause contempt petition on behalf of the State.

> The 1967 show-cause petition, prepared the day after the events, does not report any such alleged happening.

Judge Perry's 1969 contempt order does not attempt to resolve the conflict between his recollection of the facts and the State's report contained in the 1967 show-cause petition, nor does Judge Perry mention in the contempt judgment that he had ordered preparation of the petition. As related further below, Judge Perry denied Johnson and his attorneys an opportunity, both on January 23, 1967, and thereafter, to rebut the criminal charges asserted against him.

After his arrest, Johnson was removed from the courtroom (A. 16). When Johnson's then attorney, L. Lackey Rowe, Jr., Esq., attempted on behalf of Johnson to object to the court's action, Judge Perry ordered Rowe arrested and charged him with criminal contempt.[4] On January 31, 1967, the United States District Court for the Northern District of Mississippi issued a temporary restraining order enjoining trial of the contempt charge, and said charge has never been further prosecuted (*Rowe v. Mississippi*, N.D. Miss. No. WC 676, 1967).

On January 24, 1967, the day after the alleged comment was made, Judge Perry ordered that process issue against Johnson, directing him to appear on February 1, 1967, "to show cause, if any he can, why he should not be found in Contempt . . . ." (A. 5). A summons to appear on that date was subsequently served on Johnson (A. 16). Judge Perry's instruction to prepare the show-cause petition, his scheduling of the original show-cause hearing, and his subsequent rescheduling of that hearing make clear that Johnson had not been convicted of contempt at the time of his ouster from Judge Perry's courtroom on January 23, 1967.

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[4] See Rebuttal Brief for Appellant Johnson at 8, *Johnson v. State*, *supra* note 3.

On January 27, 1967, Johnson, through his then attorney, filed a motion that Judge Perry disqualify himself from the show-cause hearing scheduled for February 1. (A. 6). The motion asserted that otherwise, Johnson would be deprived of his right to a fair and impartial trial under the Fourteenth Amendment, in that (i) "Judge Perry is personally prejudiced against the defendant", "against the civil rights organizations he represents," and "against the lawyers' organization defending Mr. Johnson, namely the Lawyers' Committee For Civil Rights Under Law," and (ii) "Judge Perry witnessed the arrest of the defendant in his courtroom" and had ordered preparation of a petition citing Johnson for the alleged contempt.

Two affidavits were attached to the motion as support for the allegation of personal prejudice on the part of Judge Perry:

> —According to the sworn affidavit (A. 7) of B. E. Bergesen III, Esq., a member of the District of Columbia bar and then an attorney for the Lawyers' Committee in Jackson, Mississippi, Judge Perry in substance made the following statements while charging a grand jury in his courtroom on January 23, 1967, the same day on which he ordered the arrest of Johnson for contempt: that the Lawyers' Committee was one group of "outside lawyers" "who have come into the state . . . to assist and aid pro-socialist and pro-communist agitators"; that said lawyers "have engaged in the unauthorized practice of law;" and "have openly, illegally, and notoriously solicited business . . ."; that "if you treat them courteously then they only take advantage of you"; and that "most of these lawyers seem to have Washington or New York addresses, and about 90% are Jews."
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> —According to the sworn affidavit (A. 10) of Peter G. Eikenberry, Esq., a member of the New York bar, Judge Perry in substance made the following remarks while charging a grand jury in his courtroom on July 25, 1966, six months previously: that

> "the people with the so-called march are looking for places to cause violence and there is an ugly communistic overtone to the whole situation"; that "when I was a boy on the farm, if I saw a snake I took a club, hit it in the head and killed it"; and that "these people don't know, but they will find out, that there is no soft spot in Grenada".

No hearing was ever held on Johnson's motion that Judge Perry recuse himself from the contempt proceeding.

On February 1, 1967, the scheduled date for the show-cause contempt hearing, Johnson's attorneys filed a petition for removal of the contempt proceeding (pursuant to 28 U.S.C. §§ 1443(1) and 1446) to the United States District Court for the Northern District of Mississippi, alleging violations of Johnson's rights under federal statutes and the United States Constitution (A. 14). The removal petition, verified by Johnson, stated (A. 16) that Judge Perry's rule (announced at the opening of court on January 23, 1967) forbidding persons from walking in front of the prospective jurors "was upon information and belief, enforced only against Negroes and not against white persons."[5] In addition, the removal petition asserted (A. 19) that Johnson could not obtain a fair and impartial trial on the contempt charge, for the same reasons detailed in the motion to recuse Judge Perry (A. 6).

By order dated November 14, 1968, the U.S. District Court remanded Johnson's contempt prosecution to Judge Perry's court on the authority of *Greenwood v. Peacock*, 384 U.S. 808 (1966), after finding that "the petitioner

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[5]The removal petition also states (A. 14-15) that Johnson's civil rights activities as a staff member of the Southern Christian Leadership Conference were "well-known" to Sheriff Ingram, his deputy sheriffs, the Grenada County prosecuting attorney, Jim McRae Criss, Esq., who signed the show-cause petition (A. 3), and, "upon information and belief," to Judge Perry and to the Grenada County district attorney, Chatwin M. Jackson, Esq., who also signed the show-cause petition.

[Johnson] has adequate means available [in the state courts] to prevent encroachment of his federally guaranteed rights" (A. 22-23). Thereafter Judge Perry required that a $1,000 bond be posted guaranteeing Johnson's appearance on January 27, 1969 (the first day of the January term) to answer to the contempt charge (A. 24, 29).

On January 22, 1969, Johnson and certain other persons filed suit in the United States District Court for the Northern District of Mississippi to enjoin trials of Negroes or women in the Circuit Court of Grenada County until such time as Negroes and women were not systematically excluded from Grenada County juries in violation of the United States Constitution (*Johnson v. Gibbs*, N.D. Miss. No. WC 69-6 S, 1969). Judge Perry was named a defendant in this action and served with process on January 23, 1969.[6] A hearing on Johnson's complaint of jury discrimination was held on January 24, 1969, and on January 25, 1969, the District Court, finding that the Grenada County juries were "illegal and violative of the constitutional rights of the plaintiffs . . .," issued a preliminary injunction enjoining Judge Perry and the other defendants "from engaging in any act or practice which involves or results in discrimination by reason of race, color, or sex . . ." in jury selections.

On January 24, 1969, summons issued directing Johnson to appear in Judge Perry's courtroom on January 27, 1969, to show cause why he should not be punished for contempt of court (A. 39). This was the second scheduling of a hearing on the contempt charge made against Johnson in the show-cause petition (dated January 24, 1967).

At 9 a.m. on January 27, 1969, Johnson and his then attorney, Martha M. Wood, Esq., appeared before Judge Perry.[7] Denying Johnson's request for a hearing (A. 40),

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[6] See Rebuttal Brief for Appellant Johnson at 10, *Johnson v. State*, *supra* note 3; A. 39.

[7] There is no transcript of the proceedings before Judge Perry on January 27, 1969.

Judge Perry read the order (A. 28) adjudging Johnson in criminal contempt and sentencing him to four months' imprisonment.[8] Bail, pending appeal, was set at $2,000. Judge Perry denied motions to reduce the sentence to one month, the statutory maximum under Mississippi law for "contempt of the court while sitting,"[9] and to reduce bail to $300, the statutory maximum under Mississippi law for "appeal from judgment for contempt"[10] (A. 40-41).

At a second appearance before Judge Perry at 11 a.m. the same morning, Miss Wood renewed her request for a hearing on the contempt charge, stating that had such a hearing been granted she would have (i) proven Johnson's innocence on the merits, in part by calling as witnesses spectators who had been present in Judge Perry's courtroom on January 23, 1967; (ii) presented testimony and documentary evidence in support of the motion to recuse Judge Perry, on the grounds that a contempt charge should not be tried by the judge in whose courtroom the contempt allegedly occurred, and that Judge Perry could not provide Johnson with a fair and impartial trial; (iii) demurred to the show-cause petition on legal grounds; and (iv) proven facts in mitigation of sentence, if Johnson were nonetheless found guilty. (A. 41-42). Judge Perry refused to sign a bill of exceptions to be prepared by Miss Wood (A. 43).

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[8]Judge Perry's 1969 contempt order does not impose sentence on Johnson pursuant to a prior conviction. The 1969 order, after stating that "this Court *now* has jurisdiction of both the defendant and the subject matter," declares that "it is hereby ordered and adjudged that said Robert Johnson . . . is *hereby* adjudged in criminal contempt . . ." (A. 29; emphasis added)—contempt which had allegedly occurred two years previously.

[9]Miss. Code 1942, § 1656 (see note 1, *supra*). Johnson's sentence was modified by the Supreme Court of Mississippi to one month's imprisonment.

[10]Miss. Code 1942, § 1152. Bail was subsequently reduced to $300 by the Supreme Court of Mississippi (A. 30).

In the bill of exceptions subsequently prepared by Miss Wood and also signed by two members of the Mississippi bar who personally had been present in Judge Perry's court on January 27, 1969, Miss Wood asserted that in denying her motion for a hearing at the 9 a.m. proceeding on January 27, 1969, "Judge Perry stated that he had intended to give [Johnson] a hearing on the contempt charge . . ., but that since [Johnson] had the audacity to go to federal court (and whether Judge Perry meant by that the original removal order or the affirmative jury suit or both is not clear), he was not going to give him any hearing." (A. 40).

On February 6, 1969, only ten days after summarily adjudging Johnson in criminal contempt, Judge Perry summarily adjudged Miss Wood and the two attorneys who signed the bill of exceptions in criminal contempt, sentencing each to sixty days' imprisonment and a $300 fine. Denying that he had made the statement referred to in the above paragraph, Judge Perry declared that the said bill of exceptions (A. 38) is "filled with calculated, deliberate falsehoods and mis-statements of fact and is grossly disrespectful to this Court and contains language that no attorney should be permitted to use in an instrument filed in Circuit Court" (A. 56). On appeal, the Supreme Court of Mississippi reversed the contempt conviction as to each of the three attorneys, finding that since "the contempt, if any, in the case before us is constructive" and not "direct," Judge Perry's failure to give notice (two of the attorneys were not even present at the sentencing), to specify the grounds which constituted the alleged contempt, or to hold a hearing at which the accused could defend against the charges made his contempt judgment "a nullity". *Wood v. State*, 227 So.2d 288, 290-291 (Miss. 1969).

In his appeal brief, Johnson argued the constitutional issues raised herein, asserting (among other claims) that his conviction and sentencing without a hearing and by the same judge in whose courtroom the contempt allegedly occurred violated the due process clause of the United

States Constitution.[11] In its brief below, the State admitted that Judge Perry "apparently intended to give [Johnson] a hearing",[12] but argued that since the contempt was "direct," no hearing was required under the United States Constitution. The State conceded that the sentence imposed on Johnson by Judge Perry exceeded the statutory maximum.[13]

On March 9, 1970, the Supreme Court of Mississippi affirmed Johnson's conviction as modified (one month's imprisonment). That court explicitly declared that it simply assumed "the statement of the substantive facts set out in the [1969] judgment of the trial court," prepared two years after the event, "as true and correct."[14] On this assumption, the court held that it was not error for Judge Perry to have imposed punishment without giving Johnson an opportunity to be heard on the issues of whether he had committed contempt, of whether any contempt he committed was "direct" or "constructive," and of whether the court could ensure him a fair and impartial trial, in that "the facts set out in the [1969] judgment of the circuit court are sufficient to show that [Johnson] was guilty of direct contempt of that court . . .,"[15] Johnson's petition for rehearing was denied on April 6, 1970.

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[11] Brief for Appellant Johnson at 6-8, 12-15, *Johnson v. State, supra* (part of the certified record previously filed herein with the petition for certiorari).

[12] Brief for Appellee at 1, 8-9, 12-14, *Johnson v. State, supra* (part of the certified record previously filed herein with the petition for certiorari).

[13] *Id.*, at 21-22.

[14] *Johnson v. State, supra,* 233 So.2d at 119 (A. 49).

[15] *Johnson v. State, supra,* 233 So.2d at 122 (A. 54).

SUMMARY OF ARGUMENT

I. The actions below of the trial judge—who invoked the summary contempt power not only against Johnson but also against an attorney properly representing him and two other attorneys who merely signed the bill of exceptions—dramatically and illuminatingly demonstrate the dangers of permitting deviation from normal due process rules in contempt proceedings. Because of its long standing recognition of the potential abuse of summary contempt power, this Court has made clear that contempt proceedings may deviate from such fundamental guarantees as the right to a hearing only if the following four strict conditions have been met. None of these conditions were met here.

(A) *Summary contempt convictions must be imposed instantly.* Since Judge Perry did not impose summary punishment at the time the alleged contemptuous remark was made (January 23, 1967), the use of summary proceedings against Johnson more than two years later (January 27, 1969) violated due process.

(B) *Summary contempt proceedings must be reserved for cases where alternative remedies would be unavailing.* Since Johnson's ouster from Judge Perry's courtroom on January 23, 1967 terminated any momentary interruption in the trial court's business, the subsequent imposition of summary punishment some two years later violated due process.

(C) *Summary contempt proceedings must be reserved for cases where all necessity for a factual hearing has been excluded.* Since Judge Perry, according to the State's own documents prepared at the time, did not personally observe the alleged contemptuous act, a hearing was necessary on Johnson's denial that he committed contempt. Moreover, even if the judge himself had heard the remark, the failure to grant Johnson an opportunity to show that Judge Perry misunderstood or misheard what was said violated due process.

(D) *Summary contempt proceedings must be reserved for exceptional circumstances constituting flagrant defiance of the court.* Johnson's one comment directed at sheriffs present in the courtroom did not constitute such a threat to the court's business, and consequently the imposition of summary punishment violated due process.

II. Judge Perry's refusal to hear Johnson's timely motion, supported by affidavits from two attorneys, that the judge recuse himself on grounds including personal bias infected Johnson's conviction with constitutional error. More important, the failure of the trial judge—who was the official initiating Johnson's prosecution, and who was defendant in an unrelated law suit brought by Johnson—to disqualify himself from trying the contempt charge deprived "the contempt proceeding of the appearance of evenhanded justice which is at the core of due process."

ARGUMENT

I. THE RIGHT TO A HEARING

In a long line of cases, this Court has warned that to permit deviation from normal due process rules in contempt proceedings would leave the contempt power peculiarly susceptible to abuse.[16] The actions below of the trial judge—who invoked the summary contempt power not only against Johnson but also against an attorney properly representing him and two other attorneys who merely signed the bill of exceptions—dramatically and illuminatingly demonstrate the

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[16] *Ex Parte Terry*, 128 U.S. 289, 313 (1888); *Cooke v. United States*, 267 U.S. 517, 539 (1925) ("care is needed to avoid arbitrary or oppressive" use of contempt power); *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Harris v. United States*, 382 U.S. 162, 164 (1965) (this Court has "long demonstrated" its concern over abuse of the contempt power); *Bloom v. Illinois*, 391 U.S. 194, 202 (1968) (this Court "has long recognized the potential for abuse in exercising the summary power to imprison for contempt . . .").

dangers of permitting such deviation from due process protections, and illustrate why even in its earliest decisions this Court stood cautious of exposing persons to summary contempt proceedings.

Pointing out in *Bloom v. Illinois, supra,* that in modern times "procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases" (391 U.S. at 207), this Court concluded that the oft-suggested justification for summary contempt power (vindication of a judge's dignity or authority) cannot outbalance the right of the accused to "all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice" (391 U.S. at 208). Most recently, unanimously reversing a state court summary contempt conviction in *Mayberry v. Pennsylvania,* 39 U.S.L. Week 4133 (Jan. 20, 1971), this Court re-emphasized the traditional due process guarantee of a public trial as applicable to all contempt proceedings, except, perhaps, in that "narrowly limited category of contempts"[17] where unusual circumstances made it necessary for the trial judge observing contemptuous conduct to act instantly by criminal conviction rather than by some alternative remedy.

The opportunity to defend against criminal charges clearly constitutes one fundamental guarantee of the Fourteenth Amendment. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system

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[17] The early decisions in *Ex Parte Terry, supra,* and *Cooke v. United States, supra,* have been held by this Court to recognize only a "narrowly limited category of contempts" which can be punished summarily. *In re Oliver,* 333 U.S. 257, 275 (1948); *Harris v. United States, supra,* 382 U.S. at 165. Under *Cooke,* a contempt defendant may be denied due process protections only if his contemptuous conduct created such "an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public" that, if not "instantly suppressed and punished, demoralization of the court's authority" would have followed (267 U.S. at 536).

of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver, supra,* 333 U.S. at 273. One charged with contempt may be denied these due process protections, if at all, only if each of the following four strict conditions have been met. Not one of these conditions was met below, and hence Johnson's conviction must be reversed.

A. Summary contempt convictions must be imposed instantly.

This Court has repeatedly linked summary contempt procedures to an "immediate" necessity for "instant" vindication of the court's dignity. *Ex Parte Terry, supra,* 128 U.S. at 310 ("the ends of justice demanded immediate action"); *Cooke v. United States, supra,* 267 U.S. at 536 (only reason for denying due process hearing seen as "need for immediate penal vindication of the dignity of the court"); *In re Oliver, supra,* 333 U.S. at 275 (early decisions found applicable only where "immediate" punishment is essential). Most recently, in *Mayberry v. Pennsylvania, supra,* the opinion of the Court confirmed that summary contempt power cannot be employed (in the case of non-lawyers) except as *instant* punishment for severe contemptuous conduct such as "brazen efforts to denounce, insult, and slander the court and to paralyze the trial":

> As these separate acts or outbursts took place, . . . to keep order in the courtroom . . . [the trial judge] could, with propriety, have instantly acted, holding petitioner in contempt, or excluding him from the courtroom, or otherwise insulating his vulgarity from the courtroom.

And again:

> Instant treatment of contempt where lawyers are involved may greatly prejudice their clients but it may be the only wise course where others are involved.

Since Judge Perry did not impose summary punishment at the time the contemptuous remark was made (January 23, 1967), nor even during the period prior to Johnson's filing the removal action (February 1, 1967), clearly, there was no immediate need for withholding from Johnson normal due process rights.[18] Where "swiftness was not a prerequisite of justice", summary contempt procedures violate the Constitution. *Harris v. United States, supra,* 382 U.S. at 164.[19] "Instant" action does not include action two years later.

B. Summary contempt proceedings must be reserved for cases where alternative remedies would be unavailing.

Any momentary interruption in the trial court's selection of prospective jurors for the January 1967 term caused by the sheriffs' apprehending of Johnson and taking him to the bench was cured by Johnson's ouster from the courtroom. Once Johnson was removed, there was no necessity for Judge Perry to employ *summary* conviction procedures. The

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[18] As one commentator has noted, "if the judge can wait until the end of the trial, it is clear there is no 'need for speed' in punishment, and a hearing ought to be afforded if those charged with contempt wish to have one." Dobbs, "Contempt of Court: A Survey," 56 Cornell L. Rev. 183 (1971), at 229.

[19] In that case, defendant Harris refused to answer questions before a grand jury. Both Harris and the jurors were brought into the courtroom, where Harris again declined to answer the same question repeated by the judge. The judge, denying Harris the right to a hearing at which he would be permitted to call witnesses, found him guilty of criminal contempt, and imposed sentence. Although the contemptuous conduct had occurred in open court and in response to the judge's inquiries, this Court ruled that the contempt "was far outside the narrow category" for summary procedure (382 U.S. at 165)—*i.e.*, instant punishment was not thought necessary to vindicate the judge's dignity before the grand jury and others present in the courtroom. This Court said that "delay necessary for a hearing would not imperil the grand jury proceedings" (382 U.S. at 164), pointing out that "a hearing and only a hearing will elucidate all the facts and assure a fair administration of justice" (382 U.S. at 167).

limit of the authority to punish for contempt is the "least possible power adequate to the end proposed." *Harris v. United States, supra,* 382 U.S. at 165, quoting *Anderson v. Dunn,* 19 U.S. (6 Wheat.) 204, 231 (1821). Under these facts, explusion of Johnson from the courtroom achieved the goal of conducting court proceedings without interruption, and the subsequent imposition of summary punishment thus violated the Fourteenth Amendment.

Potential jurors, witnesses, or persons accused of crime, who may have had little contact with the judicial process, may on occasion understandably be nervous or fearful, or perhaps even exuberant, in the courtroom. To subject such persons to summary proceedings carrying criminal penalties on the basis of one off-hand remark—without prior warning, without hearing or an opportunity to give their version of the facts or to explain their intent—does not engender that genuine respect "which alone can lend true dignity to our judicial establishment."[20] Instead, the denial of normal due process guarantees (including denial of an opportunity to be heard) in prosecuting a relatively trivial offense simply debases whatever deterrent value the summary contempt power may have.[21]

A trial judge faced with courtroom disruption has available the "arsenal of authority" described in *Illinois v. Allen,* 397 U.S. 337 (1970), including exclusion from the courtroom. Summary contempt power, being liable to such potential abuse, can be selected from that arsenal only when alternative remedies would be unavailing. *Harris v. United States, supra,* 382 U.S. at 165.

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[20] *Bloom v. Illinois, supra,* 391 U.S. at 208.

[21] "[A] passing insult that does not hinder the operation of [a] trial is probably not a sufficiently important matter to merit elaborate attack through use of the contempt powers." Dobbs, *supra* note 19, at 204.

C. Summary contempt proceedings must be reserved for cases where all necessity for a factual hearing has been excluded.

Johnson has denied the allegation, made in the show-cause petition (A. 3), that he addressed courtroom officials in an offensive manner (A. 16). His attorney stated that had Johnson been given a hearing, she would have produced eye-witnesses to establish Johnson's innocence of the contempt charge (A. 42).

A hearing on this factual conflict was necessary because the trial judge did not personally observe the alleged contemptuous act. The State's own documents report that following Johnson's remark, "... the Sheriff and Deputy Sheriff, Howard Hayward seized Robert Johnson and immediately carried him before the Circuit Judge, Marshall Perry, *and related to the Judge what had transpired*" (A. 3-4; emphasis added). Thus, the record which Judge Perry ordered introduced as part of the State's prosecution reveals that he learned of the remark because it was repeated to him, at the bench, by persons who had been standing elsewhere in the courtroom when the remark was made to them.

In such a case, where the trial judge "is informed [of alleged misbehavior] only ... by the testimony ... of others," summary procedures cannot be used to punish for contempt, *Savin, Petitioner*, 131 U.S. 267, 277 (1889), since a hearing is necessary to determine whether the accused committed contempt.[22] Moreover, even if the version of the event prepared two years later were accepted as accurate,

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[22] See also *In re Oliver, supra*, 333 U.S. at 275-76 (summary procedure permissible only where "all of the essential elements of the misconduct ... are actually observed by the court ..."). One commentator had stated that "it seems reasonably clear that a hearing would be required any time the contempt is predicated upon evidence obtained from other persons since in such cases the right to confront adverse witnesses would come into play." Dobbs, *supra* note 19, at 230 (footnote omitted).

and the judge himself had heard the remark, a contempt defendant should be given an opportunity to show that the judge misunderstood what was said, inaccurately heard the remarks, did not hear the entire event, and so on.[23]

D. Summary contempt proceedings must be reserved for exceptional circumstances constituting flagrant defiance of the court.

Even assuming, as Judge Perry averred two years after the events, that he actually overheard Johnson's comment, the question "what the hell do you mean go around" cannot reasonably be deemed to constitute such "flagrant defiance" of the court or such "an open threat" to its business that compliance with normal due process requirements would have demoralized the court's authority. *Cooke v. United States, supra,* 267 U.S. at 536; *Harris v. United States, supra,* 382 U.S. at 165. In particular, where a contemptuous remark is directed not at the trial judge but at sheriffs present in the courtroom, the remark does not constitute such a "flagrant defiance of the person and the presence *of the judge*" that only instant punishment could have protected the court from "demoralization". *Cooke v. United States, supra,* 267 U.S. at 536 (emphasis added).[24]

[23] See Dobbs, *supra* note 19, at 229: "Even if the external facts are clear because they took place in the presence of the judge, the issue of motive or intent is subject to exploration" (footnote omitted).

[24] The fact that Johnson's comment came as a response to the actions and words of Sheriff Ingram and Deputy Lott, who stopped him from walking across part of the courtroom normally open to the public, tends to confirm that the show-cause petition filed the next day (January 24, 1967) accurately reported that remark as a spontaneous utterance directed at one or both of the officers. Moreover, this report also finds confirmation in the action taken by Judge Perry immediately after the remark was made. For rather than exercising any power he might have felt vested in him to punish summarily for the alleged contempt, Judge Perry requested the District Attorney and the County prosecuting attorney to "file a petition citing and requiring Robert Johnson to show cause why he should not be punished for a contempt of the Circuit Court of Grenada County, Mississippi." (A. 4)

Summary contempt procedures, if at all permissible, must be reserved for "exceptional" and "unusual" circumstances. *Harris v. United States, supra,* 382 U.S. at 164, 167.[25] Significantly, this Court expressly identified as relevant to "the questions of law" involved in challenges to contempt procedures, whether the behavior punished constituted professional misconduct by an attorney. *Sacher v. United States,* 343 U.S. 1, 5 (1952). Summary contempt was held proper, under this standard, where an *attorney* assaulted a

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By ordering Johnson to show cause, *the trial court in effect conceded that the alleged contempt was not of the kind which could be punished summarily.* One commentator has clearly distinguished summary from plenary contempt proceedings as follows:

> There are traditionally two basic modes of proceeding in contempt cases. One way of proceeding is a summary hearing in which there are ordinarily none of the trappings of the usual criminal trial . . . .
>
> The plenary hearing is usually more formal and more extensive. *It is typically triggered by the filing and service of some document that operates to charge a contempt. A show cause order may be used for this purpose,* and it usually requires the defendant to appear at a time certain to "show cause" why he should not be held in contempt. Ordinarily, evidence is introduced to prove the alleged contempt . . . . [Dobbs, *supra* note 19, at 221 (footnote omitted; emphasis added)].

[25] Since the Fourteenth Amendment incorporates the rights to confront witnesses and to have effective assistance of counsel expressly written into the Sixth Amendment (*Pointer v. Texas,* 380 U.S. 400, 403 (1965); *Gideon v. Wainwright,* 372 U.S. 335, 341 (1963)), Constitutional rights accorded federal contempt defendants by virtue of the Sixth Amendment belong also to state defendants. This was made clear in *Mayberry v. Pennsylvania, supra,* where the Court said: "Whether the trial be federal or state, the concern of due process is with the fair administration of justice." In addition, since in *Harris v. United States, supra,* this Court characterized Fed. R. Crim. Procedure 42(a) as restating the limitations on non-statutory summary contempt power (382 U.S. at 165 n. 3), the procedural rights accorded federal contempt defendants in decisions (such as *Harris*) interpreting that Rule also attach to contempt defendants in state courts.

United States Marshal with a weapon in the courtroom, "with intent to obstruct the administration of justice";[26] or where *attorneys* engaged in long-continued conduct, despite warnings, which "was not such as merely to offend personal sensitivities of the judge" but actually "prejudiced the . . . conduct of the trial," and which conduct was described on appeal as "wilfully obstructive", "outrageous", and "abominable".[27]

By contrast to the continued "abominable" behavior subjecting knowledgeable attorneys to summary proceedings in *Sacher*, here summary conviction hangs on one remark made by a 20-year-old layman perhaps unschooled in the delicacies of speech with which law-enforcement officials in a courtroom should be addressed. Further, Johnson could not have intended his remark to interfere with the court's business to his advantage inasmuch as that single comment, which was not directed at the bench, did not occur during a trial or other proceeding in which he was the defendant. Clearly, the circumstances here (set forth in more detail in the statement above) belie any conclusion that the single comment allegedly made by Johnson could permit the extreme response of summary procedure—imposed on him some two years later—to withstand scrutiny under the due process clause. As a matter of fact, if Johnson made the remark at all, the record indicates that he made it as the result of a simple mistake—he had not heard the court's directions that caused the sheriff to tell Johnson to move.

II. THE RIGHT TO EVENHANDED JUSTICE

Judge Perry's failure to disqualify himself from the proceedings against Johnson, to schedule a hearing before another judge on Johnson's timely motion to recuse (A. 6),

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[26] *Ex Parte Terry, supra,* 128 U.S. at 298.

[27] *Sacher v. United States, supra,* 343 U.S. at 3-5 (one defendant was a layman acting as his own lawyer).

or even to hear the motion himself, infected Johnson's conviction with constitutional error.

Impartiality in the judicial process is a constitutional principle,[28] and "the defendant in criminal contempt proceedings is entitled to a public trial before an unbiased judge . . . ." *Bloom v Illinois, supra,* 391 U.S. at 205, citing *In re Oliver, supra,* and *Offutt v. United States, supra.* Since "a fair trial in a fair tribunal is a basic requirement of due process" (*In re Murchison,* 349 U.S. 133, 136 (1955)), motions to avoid an allegedly biased tribunal "raise constitutional issues both relevant and essential" (*Holt v. Virginia,* 381 U.S. 131, 136 (1965). Johnson was therefore entitled to a hearing on his charge (supported by sworn affidavits from two attorneys) that elementary safeguards of justice would be denied him by trial before Judge Perry.

But there is much more at stake here than merely gaining the opportunity to pursue a motion raising important constitutional claims. "[O]ur system of law has always endeavored to prevent even the probability of unfairness . . . . Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison, supra,* 349 U.S. at 136. In light of this "stringent rule," even if the hostility which Judge Perry was reported to have expressed against civil rights workers and against the group of lawyers to which Miss Wood (Johnson's attorney) belonged did not in fact carry with it personal prejudice against Johnson, the circumstances here impel the conclusion that Judge Perry was so personally enmeshed in matters involving the accused other than the contempt charge itself that only another judge could have afforded Johnson due process at trial.[29]

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[28] *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145, 148 (1968).

[29] "[W]here conditions do not make it impracticable, or where the delay may not injure public or private right," the judge in whose courtroom contemptuous conduct occurs may properly ask that one

The circumstances here which deprived the contempt proceeding "of the appearance of evenhanded justice which is at the core of due process"[30] are as follows:

> —The remark for which Johnson was summarily punished had been made in Judge Perry's courtroom. Since Judge Perry learned of that remark from courtroom officials and himself ordered Johnson's arrest for contempt, he could not later have approached the issue of Johnson's guilt or innocence of the contempt charge with a completely open mind and detached view. Because behavior viewed in the judge's mind as contempt strikes "at the most vulnerable and human qualities of a judge's temperament," there must be protection "against the arbitrary exercise of official power." *Bloom v. Illinois, supra,* 391 U.S. at 202; *Mayberry v. Pennsylvania, supra.* An independent judge would have provided such protection.
>
> —Almost immediately after the alleged remark by Johnson, Judge Perry held Johnson's then attorney, L. Lackey Rowe, Jr., Esq., in criminal contempt in connection with representation of Johnson. An independent judge would have heard the contempt charge against Johnson free of any preconceptions about the quality and integrity of Johnson's counsel or about the nature and persuasiveness of possible defenses to be offered by counsel.[31]

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of his fellow judges hear the charge. *Cooke v. United States, supra,* 267 U.S. at 539, quoted with approval in *Mayberry v. Pennsylvania, supra.*

[30] *Mayberry v. Pennsylvania, supra* (concurring opinion of Mr. Justice Harlan).

[31] The fact that Judge Perry, only ten days after summarily holding Johnson in contempt, summarily—and improperly—held in criminal contempt Johnson's then attorney (Martha M. Wood, Esq.) and two attorneys who merely signed Johnson's bill of exceptions, confirms that Judge Perry could not try the charge against Johnson with dispassion.

—Judge Perry initiated prosecution of Johnson by ordering his arrest for contempt and by directing preparation of the show-cause petition, and later convicted Johnson of the charge. An independent judge would not have so combined "the historically separate powers" of prosecutor and trial judge.[32]

—Judge Perry was a defendant in a suit brought by Johnson and others, charging racial discrimination in the selection of juries in Judge Perry's court.[33] Apart from the offense which any party may naturally take at allegations made in an official complaint against him, Judge Perry's involvement in this suit—in which an injunction issued against the defendants only two days before the 1969 contempt proceedings—makes his subsequent actions as trier of the criminal accusation against Johnson irreconcilable with the ideal of a dispassionate judiciary envisioned by the guarantee of a "fair trial in a fair tribunal".[34] An independent judge would not have had any motive to utilize the contempt proceeding to respond to unrelated personal grievances.

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[32] *In re Oliver, supra,* 333 U.S. at 278 (concurring opinion); *In re Murchison, supra,* 349 U.S. at 137 ("Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."). See also Dobbs, *supra* note 19, at 283: "In criminal contempts—and any courtroom misbehavior—the judge who acts as a prosecutor by initiating the charge should not, except where real necessities require it, be the judge who tries the case."

[33] *Johnson v. Gibbs,* N.D. Miss., No. WC 69-6 S, 1969. See p. 10, *supra.*

[34] According to the bill of exceptions filed below by Miss Wood (A. 38), in denying her motion for a hearing at the 9 a.m. proceedings on January 27, 1969, "Judge Perry stated that he had intended to give [Johnson] a hearing on the contempt charge . . . , but that since [Johnson] had the audacity to go to federal court (and whether Judge Perry meant by that the original removal order or the affirmative jury suit or both is not clear), he was not going to give him any hearing." (A. 40). Judge Perry subsequently denied having made that statement (see p. 12, *supra*).

Clearly, the facts of this case do not demonstrate any pressing need, in the administration of justice, why Judge Perry could not have been replaced by an independent colleague. Since conviction did not occur until more than two years after the alleged contempt, it cannot be seriously contended that the swift dispensation of justice prevented the case from being reassigned.

By virtue of Judge Perry's relationships to Johnson prior to the contempt proceeding—as the official who initiated his prosecution, as the judge who held his earlier attorney in contempt, and as a defendant who was successfully sued by Johnson—Johnson was deprived of his right to a decision-making process insulated from any forces or considerations other than the judgment of a detached jurist unswervingly focused on the issue of his guilt or innocence. These "are subtle matters, for they concern the ingredients of what constitutes justice," and "justice must satisfy the appearance of justice."[35] Johnson did not receive these due process guarantees. *Mayberry v. Pennsylvania, supra.*

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Mississippi should be reversed. Petitioner requests that reversal be accompanied with the statement that should the contempt charge against Johnson be further pursued in

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[35] *Offutt v. United States, supra,* 348 U.S. at 14.

the Circuit Court of Grenada County, the judge who imposed sentence on Johnson should invite another judge to try the charge.[36]

Respectfully submitted,

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[36] See *Cooke v. United States*, *supra*, 267 U.S. at 539.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

NO. 5485

ROBERT JOHNSON ..... Petitioner

V.

STATE OF MISSISSIPPI ..... Respondent

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

ARGUMENT

For purposes of this appeal the facts of this case, except inferences to be drawn therefrom, are fairly stated in the Petition and the Brief for Petitioner.

Respondent has no argument with the rationale of the authorities cited by Petitioner, but submits that the procedure in Mississippi for review on appeal of contempt convictions supplies a complete answer to the contention of Petitioner. Attached hereto as an Appendix is a copy of an Opinion of the Mississippi Supreme Court in the case of *Shattuck v. State,* decided in 1875 and found in 51 Miss. at page 50. *Shattuck* refers to the case of *Watson v. Williams,* 31 Miss. 331, decided in 1858, and that part of the Opinion beginning at page 341 of 31 Miss. is also appended hereto. In these cases there is a thorough discussion of the law with respect to contempt of court to the effect that only the contemned court can make the finding of contempt, and there is no appeal from that finding nor any collateral review. These cases reflect the law with respect to contempt as

it then stood in England and in this country. It is readily apparent in the present enlightened age that such power in the hands of one judge could lead to many injquities and the venting of personal spleen at the whim of such a judge. Undoubtedly the Mississippi Legislature realized this and by what is Section 2316 of the Mississippi Code of 1880, now appearing as Section 1452 of the Mississippi Code 1942, Recompiled, provided for an appeal, as was had in this case, to the Supreme Court of Mississippi, and to be tried on the record. There is no known source from which to verify or determine what prompted this action by the Mississippi Legislature as early as 1880. It is obvious that the enactment of this statute was to prevent any iniquities inherent in the contempt power of a single judge and provides a dispassionate review of any such judge's actions by determining from the cold printed record on appeal whether or not a contempt had been committed. This statute provides that on appeal from a contempt conviction the appellate court shall determine "[W]hether the appellant was guilty of contempt; and the sentence or decree or order of the court below may be *affirmed, reversed, annulled, or modified, according to the judgment of the appellate court.*" [Emphasis Added]

It is respectfully submitted that this provision in the Mississippi Law accomplishes the same purpose as having a judge other than the one contemned to hear the matter at the trial level. As a matter of fact, the alleged contemnor is protected by the requirements that the majority of the members of the Supreme Court find him in contempt. To show this Court that the Mississippi Supreme Court does as it should in the protection of one found guilty of contempt, there is also appended hereto a copy of an Opinion of that Court in *Boydstun*

v. State of Mississippi, number 46,257, decided recently but not yet reported.

CONCLUSION

Wherefore, it is respectfully submitted that in view of the provisions of Section 1152 of the Mississippi Code 1942 Recompiled, as applied by the Mississippi Supreme Court, one found in contempt is better protected than he would be if another single judge heard the evidence below and made a finding thereon.

Respectfully submitted,

A. F. SUMMER, ATTORNEY GENERAL

By:

G. Garland Lyell, Jr.
Assistant Attorney General

CERTIFICATE

I, G. Garland Lyell, Jr., Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day, March 19, 1971, A. D., mailed five copies of the foregoing Brief and Appendices each to Honorable Stephen W. Porter and Honorable Richard B. Ruge, Attorneys for Petitioner, at their usual Post Office address in Washington, D. C.

ASSISTANT ATTORNEY GENERAL

APPENDIX A

A. A. Shattuck vs. The State.

1. Contempts: *Power to punish therefor.*

   Power to punish for contempts is inherent in all courts, especially those of superior cognizance. This is essential to the preservation of order and the proper discharge of the judicial functions.

2. Same: *Power of court to review for contempt.*

   One court cannot review a contempt committed against another court, nor can a judge discharge a prisoner upon *habeas corpus,* committed for a contempt of another court.

3. Same: Same.

   Although jurisdiction does not belong to an appellate court to review a judgment for contempt, yet, if the contempt complained of was not committed in the presence of the court, but was for the disregard of its process or disobedience of its precept, common justice demands that the offender should have an opportunity to purge himself of the offense. The usual practice being to serve a rule on the party to show cause, etc.

4. Same: *Attachment.*

   If the respondent fails to make a true return on the writ of *habeas corpus,* an attachment is the proper process to bring the party into court to answer for the contempt.

Error to the Circuit Court of *Lee* County.

Hon. B. B. Boone, Judge.

The facts in this case are very fully stated in the opinion of the court.

The only question considered by the court being, whether it had jurisdiction of such cases. It is unnecessary to enumerate the various assignment of errors.

1. The writ of *Habeas corpus* does not show that it was issued by the officer appointed by the *fiat* of the judge to issue it.

2. The writ of *habeas corpus* was not made returnable within a reasonable time.

3. Final judgment was entered against the appellant, A. A. Shattuck, in the first instance, and without notice to him.

4. Said judgment was based on the *ex parte* affidavits of the attorneys for D. L. Low, the relator, a mode of trial unknown to law and not "by due course of law," repugnant to our constitution, and before any papers in the *habeas corpus* case had been filed in court.

5. Said judgment was rendered in the absence of this appellant.

6. The affidavits of F. S. White, S. M. Meek and L. F. Bradshaw, show that the relator was not in the custody of this appellant.

7. Said affidavits show that if any contempt of the process of the court occurred, it was committed by J. W. Sanders, the jailer of Colfax county, and a party cannot be guilty of contempt by proxy.

8. Said affidavits show that J. H. Shipman, the deputy sheriff of Shattuck, attempted to execute said writ, but was prevented by said jailer.

9. Said affidavits do not show that A. A. Shattuck failed to execute said writ.

10. Said affidavits show that H. B. Whitfield, the district attorney of the seventh judicial district, in which the relator was imprisoned, had forbidden the removal of Low by this appellant.

11. The record shows no notice of this *habeas corpus* proceeding; was issued to or served on the district attorney in whose district the relator was imprisoned.

12. The coroner's return shows that this appellant was, at the time of said alleged contempt, at his home confined to his bed by severe sickness.

13. The record shows that A. A. Shattuck was not summoned to appear and show cause against the said fine of $500 being made final.

14. The record shows that A. A. Shattuck never was under the jurisdiction of the court to abide its judgment or for any other cause.

15. The record shows that Shattuck was never present before said court, but was sick in bed, and that he was not allowed time nor opportunity to make any defense, but was peremptorily and summarily punished without hearing or trial.

16. A. A. Shattuck has never had his day in court.

17. The record shows that said *habeas corpus* trial was had in vacation, and not before any regular court, and that execution was ordered to issue for said fine, instead of an order that appellant stand committed.

18. The record shows that said *habeas corpus* trial was had in vacation, and not before any regular court, and that execution was ordered to issue for said fine, returnable to the circuit court of Lee county at its regular term, instead of to Chickasaw county.

19. The record shows that the alias writ of *habeas corpus* was issued by the chancery clerk of Lee county.

20. The writ of attachment against Shattuck was issued by the chancery clerk of Lee county, who had no authority, the circuit clerk being the clerk of the court.

Flaniken & Beckett, for plaintiff in error:

Construction of the law. Black. Com., 59, 60, §§ 3, 4 and 5; Code, 1871, § 1415; see also §§ 1409, 1412, 1415; 38 Miss., 331. The judgment is void. 1 S. & M., 351; 4 id., 751; 41 Miss., 49 and 668; 10 S. & M., 159; 3 id., 529; 4 id., 538 and 549; 1 id., 521 and 584; 5 id., 559; 7 id., 85, 127 and 449; 9 id., 613. The proceedings must be legal or the high court will interfere. Const., art. I, §§ 2 and 7; 4 S. & M., 778; 10 id., 103; 4 How., 401; 7 id., 127; 35 Miss., 383; 2 J. J. Marsh., 275; 4 Paige, 378; 1 Va. cases, 330; 1 Scam., 440; 2 Sand., 724; Co. on Lit., 288; 3 Scam., 402; 6 Johns., 335; 1 Hill, 139; 6 Cow., 381. The court had but limited or special jurisdiction. Code, 1871, §§ 1400 and 1408. Not generally reviewable, but at discretion. 4 S. & M., 778; 13 id., 302; 41 Miss., 404; 43 id., 373; 37 id., 605. The judgment *nisi* was void for want of notice. 35 Miss., 382; 31 id., 133; 3 Cush., 883; 1 S. & M., 521; 7 id., 85; 9 id., 613; Code, 1871, §§ 225, 226, 286, 700, 2250 and 2253. The judgment was not in due course of law. 7 S. & M., 475; 5 How., 157; Const., art. I, §§ 2 and 7. He was not present in court. 49 Miss., 716. He must be personally present to purge himself of the contempt. 10 S. & M., 103. The evidence was illegal. 7 S. & M., 475; 39 Miss., 318.

Frank Johnston, on the same side:

Filed a brief and written argument on the facts, and cited and commented on the following authorities: Black.

Com., book IV, 287; In re Hickey, 4 S. & M., 783; Code, 1871, §§ 410, 411.

G. E. Harris, Attorney General, for the state, insisted that this court has no jurisdiction, and cited, 4 S. & M., 754; 25 Miss., 883; 36 id., 331; Code, 1871, §§ 221, 404, 533, 979, 1400, 1407, 1411 and 1414.

SIMRALL, J., delivered the opinion of the court.

A. A. Shattuck, the sheriff of Colfax county, was fined five hundred dollars for contempt, in failing to produce the body of one Love before the judge of the circuit court at Tupelo in Lee county, in obedience to a writ of *habeas corpus* to him directed.

The writ was issued on the 12th of August, 1875, and was made returnable on the 13th, the next day. It appears that the writ was placed in the hands of one Shipman, the deputy sheriff; the fine was imposed on the 13th of August, and purports to be a final judgment: on the same day an attachment was issued against Shattuck, directing his arrest and production before the judge on the next day, "to show cause why he detains in custody the body of the said D. L. Love." On the 14th, the coroner returned on the attachment, "Executed this writ by arresting A. A. Shattuck, he being sick at the time and in his bed." No action was taken on the attachment.

The preliminary question has been presented and argued by counsel, whether this court can review the judgment of an inferior court imposing a punishment for contempt. Power is inherent in all courts, especially those of superior cognizance to punish for contempts of its authority and dignity. It is essential to the preservation of order and decorum and the proper discharge of the judicial functions. If the breach of decorum, or

the indignity to the magistrates of law are committed in the presence of the court, the trial and judgment are instantaneous and summary, both are accomplished *uno flatu*. The offense is against the court and tends to impede and embarrass the administration of justice. One court cannot punish a contempt committed against another, nor can one court judge of a contempt against another. Hence, in Ex parte Adams, 25 Miss., 886, it was held, that a judge could not discharge a person who had been committed for a contempt of the circuit court. No inquiry could be made, whether a proper case had arisen for punishment or not, whether the judgment was erroneous or not. If the court had jurisdiction and rendered judgment, the prisoner could not be delivered.

In the case of Watson v. Williams, 36 Miss., 341, *et seq.*, the right to review a judgment for contempt on a writ of error, was most elaborately investigated on authority, and the conclusion reached that the court did not have such appellate power. The court closes its opinion with these words: "We have just seen from a review of the decisions of highest authority, both in England and in this country, that by the common law such jurisdiction does not belong to a court of errors and appeals. Hence, our constitution seems not only not to confer, but to deny this jurisdiction to the high court of errors and appeals." Cases cited in 5th Yerg., 456; 1 Black. (Ind.), 166, and 1 Bibb., 600, are to the same effect. Also, Easton *v.* State, 39 Ala., 551.

Although the judgment for contempt cannot be reconsidered on *habeas corpus*, nor reviewed on writ of error, yet, if the court had not jurisdiction, the order would be void. If the act complained of was done in

facie curioe, the offender being in the presence of the court, may at once be punished.

But if the act is alleged to be in disregard of the process of the court, or disobedience of its precepts, or done, not in its presence, then common justice should require that the court should inquire into the facts and afford the offender an opportunity to purge himself.

The practice is to serve a rule on the party to show cause. Hollingsworth *v.* Duane, Wall., 141. If the respondent has not made a true return on the writ of *habeas corpus,* attachment is the proper remedy to bring the party into court to purge himself of the contempt. Worcester *v.* Truman, 1 McLain, 483; Gates *v.* M'Daniel, 3 Port, (Ala.), 356; United States *v.* Dodge, 2 Gall., 313; United States *v.* Green, 3 Mason, 482. In such cases, notice in some form must be given.

It may be, therefore, for want of notice, the sheriff not being in court, but sick at home in Colfax county, that the judgment imposing the fine is void, and that it may be assailed by motion to quash the execution. If void, it cannot be legally enforced; but we have no authority to decide on that point, since we dismiss the appeal for want of jurisdiction.

APPENDIX B

WATSON v. WILLIAMS, 36 Miss. at 341

The power to fine and imprison for contempt, from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and coexisting with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it. In this country, all courts derive their authority from the people, and hold it in trust for their security and benefit. In this State, all judges are elected by the people, and hold their authority, in a double sense, directly from them; the power they exercise is but the authority of the people themselves, exercised through courts as their agents. It is the authority and laws emanating from the people, which the judges sit to exercise and enforce. Contempts against these courts, in the administration of their laws, are insults offered to the authority of the people themselves, and not to the humble agents of the law, whom they employ in the conduct of their government. The power to compel the lawless offender, against decency and propriety, to respect the laws of his country, and submit to their authority (a duty to which the good citizen yields hearty obedience, without compulsion) must exist, or courts and laws operate at last as a *restraint* upon the upright, who need no restraint, and a license to the offenders, whom they are made to subdue.

Chancellor Kent, in the case of *Bates*, 4 John. R. 353, in concluding a review of the English cases on this subject, says: "The trust is given to the courts, not for themselves, but for the public, who are deeply interested in the preservation of this power, in its accustomed vigor."

He cites the case of the *Earl of Shaftesbury*, 2 St. Tr. 615; 1 Mod. 144; who was imprisoned by the House of Lords for "high contempt committed against it," and the case brought into the King's Bench, where the court held, that they had no authority to judge of the contempt, and remanded the prisoner. "The court," says he, "in that case, seem to have laid down a principle from which they have never departed, and which is essential to the due administration of justice; this principle, that every court, at least of the superior kind, in which great confidence is placed, must be *the sole judge*, in the last resort, of contempts arising therein, is more explicitly defined, and more emphatically enforced, in the two subsequent cases of *The Queen v. Patty et al.* 2 Lord Raym. 1105, and of *The King v. Crosby*, 3 Wilson, 188; 2 Black. R. 754."

In Crosby's case, the language of the judges is singularly impressive. Lord Chief Justice De Grey observed, that "when the House of Commons adjudge anything to be a contempt, or a breach of privilege, their adjudication was a conviction, and their commitment in consequence was execution; and that no court could discharge or bail a person that was in execution by the judgment of any other court. . . . That in the case of a commitment by the King's Bench or Common Bench, there was no appeal; that if the courts should abuse their jurisdiction, it would be a public grievance, and redress must be sought from the legislature; that the

constitution had provided checks to prevent its happening. It must be left at large; it was wise to leave it at large. Some persons, some courts, must be trusted with discretionary powers; and, though it is possible, it was in the highest degree improbable, that such abuses should ever happen."

Mr. Justice Blackstone pursued the same train of observation, and declared that all courts—by which he meant to include the two houses of Parliament, and the courts of Westminister Hall—"could have no control in matters of contempt; that the sole adjudication of contempts, and the punishments thereof, belonged exclusively, and without interfering, to each respective court; that infinite confusion and disorder would follow, if every court of the Hall should have power to examine the commitments of the other courts for contempts; that the judgments and commitments of each respective court, as to contempts, must be final, and without control. It was a confidence that might, with perfect safety, be confided in the judges and the houses of Parliament. That the objection, as to abusive consequences, proved too much, because it was applicable to all courts of dernier resort; and general convenience must always outweigh partial inconvenience."

Chancellor Kent, after these citations, adds: "I have cited the opinions of other judges much at large, because I could not hope to improve upon the strength of their observations; and I entertain the most perfect conviction, that the law, as they declared in this case, was well understood, and definitely established as part of the common law of England at the time of our Revolution. Mr. Justice Grose, many years afterwards, thought he did enough to prove the settlement of the law on this

subject, by merely quoting this very able decision of Lord Chief Justice De Grey."

This decision, and the reasoning employed by the judges, is adopted and fully sanctioned, by the Supreme Court of the United States, in *Ex parte Kearny*, 7 Wheat. 38, in an able opinion delivered by Judge Story.

These cases were also considered and reviewed by Cowen, J., in the Supreme Court of New York, and approved as declarative of the common law of England. He says, "that it was agreed in the *Mayor of London's case* (Crosby), 3 Wilson, 188, that in cases of commitment for contempt, by the Lords or Commons, or by any other court of general jurisdiction, no other court had power to interfere, and relieve by *habeas corpus*, or in any other way, because there was no appeal." Blackstone, J., said, "The sole adjudication of contempts, and the punishment thereof, in any manner, belongs exclusively, and without interfering, to each respective court." And De Grey, Ch. J., said, "In case of a commitment by this court, or the King's Bench, there is no appeal." *The People v. Nevins*, 1 Hill, N. Y. R. 164-5. See the late case of *Stockdale* v. *Hansard*, 9 Adolphus & Ellis, 1; 36 E. Com. L. R. 13.

"The right of punishing contempts by summary conviction, is inherent in all courts of justice and legislative assemblies, and is essential for their protection and existence. It is a branch of the common law, adopted and sanctioned by our State Constitution. The discretion involved in this power, is in a great measure arbitrary and undefinable, and yet the experience of ages has demonstrated, that it is perfectly compatible with civil liberty, and auxiliary to the purest ends of justice.

"The known existence of such a power, prevents in a thousand instances the necessity of exerting it, and its obvious liability to abuse, is, perhaps, a strong reason why it is so seldom transcended. This power extends not only to acts, which directly and openly insult or resist the powers of the court, or the persons of the judges, but to consequential, indirect, and constructive contempts, which obstruct the process, degrade the authority, or contaminate the purity of the court. 4 Black. Com. 280; 2 Hawk. Pl. Cr. b. 2, c. 22; 1 Com. Dig. Attachment, A.

"The officers of the court are peculiarly subject to its discretionary powers, and may be punished in this summary manner, for oppression, extortion, negligence, or abuse in their official capacity. 1 Bac. Abr. tit. Attachment; 2 Hawk. tit. Attachment; 3 Atk. 268."

Per Senator Platt, in *Bates v. Lansing*, 9 John. R. 415-16.

The same doctrines of the common law are discussed and admitted, in *Hollingsworth v. Duane*, reported in Wallace, C. C. R. 77.

So in Mississippi, the power of the courts to fine and imprison for contempt, as a necessary incident of judicial power, independent of statutory enactment, inherent in the very nature of their organization, and derived from the constitutional provision which gave them being, *ex necessitate rei*, has been repeatedly recognized by her judicial tribunals. In *Lewis v. Garrett's Adm'r.* 5 How. Miss. R. 453, the doctrine is clearly stated and enforced, both upon principle and authority, by Judge Trotter. So in *Vertner v. Martin*, 10 S. & M. 103. The power of the Probate Court, to imprison by an attachment, for a contempt, an administrator, for failing

to pay a sum of money, which he had been previously ordered to pay, was sustained, and Walker's R. 310, cited as authority for such proceeding.

This case was a writ of error to the High Court. No opinion was expressed, however, as to the power or jurisdiction of the High Court, on the subject of contempts against other jurisdictions.

And in the case of *Adams*, 25 Miss. R. 883, before Justice Yerger, on *habeas corpus*, these doctrines are ably discussed, the authorities reviewed, and the same conclusions announced.

In Kentucky, in the case of *Johnston v. Commonwealth*, 1 Bibb's Kentucky R. 598, this subject is discussed with reference to the power of the Court of Appeals to review judgments and orders for punishing contempts in other jurisdictions, and denied. After reviewing the doctrine of the common law on this subject, Chief Justice Bibb thus concludes his able judgment:—

"The inconveniences which might result from sustaining writs of error and appeals from orders for punishing contempts are worthy of great consideration. We ought, indeed, to weigh well the consequences, before we give a deliberate sanction to a procedure never once recorded in juridical annals, from the earliest periods down to the present day, except in the two cases just cited. The great purposes for which courts are intrusted with the power of punishing contempts demand a speedy and summary proceeding, not consistent with the delays consequent on writs of error and appeals. If, free from the apprehension of immediate punishment, the contemptuous witness, in the face of the court, and in the very act of trial, might paralyze the hand of justice by refusing to give evidence, the poison would circulate

through every artery of the judicial system. In fact, the rights, liberty, and property of the whole community are immediately involved, and interested in the support of the constituted authorities. What are laws without the means competent to secure and enforce a due obedience?

"To this end, a power in courts of justice to suppress contempts and disobedience to their authority, by immediate punishment, is essentially necessary, and results from the first principles of judicial establishments. Laws are necessary to the good order of society. Courts are ordained by the laws as necessary for their due administration. Hence, due respect for the courts of justice is as necessary as a regard for the laws themselves.

"For, when once such respect is lost among the people, the authority of the court is at an end. And that court is impotent and contemptible indeed whose power to punish a contempt to its authority, depends upon the discretion of a superior.

"It seems to be an established principle of law that one court cannot punish a contempt committed against another court. Intimately related to this is another sentiment,—that one court cannot judge of a contempt committed against another. In fine, it seems necessary to the very existence of a court, in the healthy exercise of its powers, that it should have the exclusive jurisdiction to judge of contempts to its authority.

"But it may, perhaps, be asked, if each court is suffered to exercise the power of punishing contempts, without the control and revision of any other court, where is the security of the citizen against the arbitrary oppression of the judge, by a wilful infraction of the

law? It is answered, that the citizen finds security in his own correct demeanor; in the great lenity and unwillingness which has generally been remarked in courts to resort to this exercise of their powers; but above all, in that responsibility which the judge owes to the assembled representation of the country, for any corrupt or wilful and arbitrary abuse of his power.

"It is the boast of our government, that no officer, however exalted his station may be, is above the law; neither can he indulge a wild, arbitrary, or licentious disposition, without responsibility."

Government cannot be administered without committing powers in trust and confidence. The exercise of discretion must be intrusted by the people to some agents, in matters of this character. And it seems to us to be safer and more satisfactory, under our system, to leave it in the hands of the respective courts, immediately deriving their authority from the people, and amenable to the public for its just and wise exercise, than to place it in the hands of an appellate tribunal, removed, in a great measure, from their scrutiny as well as their direct authority.

Whether considered, therefore, with reference to the protection of the authority and just power of the courts, or with regard to the protection of the liberty of the citizen against the unjust and tyrannical exercise of power, a due regard for the security of all will be best promoted, by leaving the whole subject of contempts to the courts respectively, without interference from this court.

So, in Tennessee, in the case of *Andrew L. Martin*, 5 Yerger, 456, the same doctrines are announced as in Kentucky, by Catron, J., and powerfully enforced, de-

nying the right of appeal or writ of error to serve judgments for contempts when the court has jurisdiction.

So, in Indiana, in the case of *The State v. Tipton, Sheriff*, 1 Blackf. R. 166, the writ of error was dismissed, —the court holding that courts of record have exclusive control over charges for contempt; and their conviction or acquittal is final and conclusive. "This great power," says the court, "is intrusted to these tribunals of justice, for the support and preservation of their respectability and independence; it has existed from the earliest period to which the annals of jurisprudence extend; and except in a few cases of party violence, it has been sanctioned and established by the experience of ages,"—referring to English and American cases, already cited.

And, in Illinois, in the case of *Clark v. The People*, Breese R. 266, the same principles are held by the Supreme Court of that State.

Indeed, in the absence of any constitutional or statutory regulation on the subject, it is believed the authorities are uniform on this point.

Upon examination of our constitution and laws, we are unable to perceive any authority for the assumption of jurisdiction in such cases.

The constitution says, "The High Court of Errors and Appeals shall have no jurisdiction but such as properly belongs to a court of errors and appeals." To ascertain what jurisdiction properly belongs to a court of errors and appeals, reference must be had to the system whence we have derived the great body of our unwritten laws,—the common law of England. We have just seen—from a review of the decisions of highest authority, both in England and this country—that, by

the common law, such jurisdiction *does not properly belong to a court of errors and appeals.* Hence, our constitution, seems not only, not to confer, but to deny, this jurisdiction to our High Court of Errors and Appeals.

The power in question is one absolutely necessary to enable the Probate Court to protect, preserve, and administer the estates of decedents, and to save the property of infants from waste and spoliation by unprincipled men, who may have obtained the management of either, by fraud or imposition, or without sufficient security. If, for every order or decree made by that court, requiring executors, administrators, or guardians, to make returns, or file inventories, or do or perform any other duty which the court, under the law, may and ought to require, and imposing penalties for disobedience, such executor, administrator, or guardian, may take an appeal, and disregard the order, estates could never be administered, and the appointment of a guardian would operate to the divestiture of the estate of the ward; in many cases, in favor of the unprincipled guardian.

Our laws are not thus deficient: while they amply protect the liberty and rights of the citizen, they as amply provide for the prevention and punishment of the wrongs he may seek to inflict.

Let the appeal be dismissed, for want of jurisdiction in this court.

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

NO. 46,257

R. W. BOYDSTUN, JR.

V.

STATE OF MISSISSIPPI

BRADY, Justice:

This is an appeal from the Circuit Court of Winston County, Mississippi, wherein the appellant, R. W. Boydstun, Jr., was found guilty of direct contempt of court and was sentenced to serve a term of thirty days in the Winston County jail. From that judgment this appeal is taken.

On July 15, 1970, the appellant, a member of the Winston County Bar, appeared before the Circuit Court of Winston County, Mississippi, acting as his own attorney, in regards to an appeal from a plea of not guilty in a justice of the peace court to the offense of improper parking on a public thoroughfare. The appellant first filed and presented a motion to dismiss the cause, and after this was overruled the appellant presented a second instrument in his personal handwriting which was styled, "Motion for the Honorable Circuit Judge to Recuse Himself." This motion contained the following:

1. Said Judge has exhibited strong personal animosity toward Defendant and cannot give Defendant a fair trial.

2. The prosecuting witness, Sheriff Fred Sloan, and District Attorney G. Jyles Eaves, who took an overly active part in the recent campaign for re-

election of the Honorable Judge Perry and the said Judge made a statement to the Grand Jury in the presence of all petit jurors to the effect that Fred Sloan is the greatest sheriff he has ever known.

The circuit judge then informed the appellant that the motion contained language and statements which were contemptuous and announced to the appellant that he would have opportunity to prove or explain the statement or he would be held in contempt and sentenced for the contempt.

The appellant then requested that he be allowed to amend his motion and the court granted permission for him to file anything further that he desired. The appellant then seated himself in the courtroom and in his own handwriting prepared and presented an amended motion styled, "Amendment for Motion for Judge to Recuse Himself from Hearing Said Cause." This motion, as the one preceding it, was duly filed by the circuit clerk on July 15, 1970. This amended motion contained a further reference to the statement attributed to the circuit judge in his address to the grand jury to the effect "that you have one of the best, if not the best, sheriff in the State of Mississippi," which statement the appellant claims he transcribed during the presentation some three days before and was now directly quoting from those notes. The circuit judge claimed that the statement was correct but for the addition of the phrase, "if not the best," and cautioned the appellant that his motion was grounded in hearsay and not in fact. Appellant was unable to get any witnesses to testify who may have heard the statement as he had recalled it, though there were some thirty trial jurors, twenty grand jurors and other spectators, witnesses,

members of the bar and officers of the court present at the time the statement was made by the court.

The appellant then stated that the motion to recuse was handed to the judge personally without publicity, and that no contempt was intended and reiterated his feelings that "the court had a certain amount of animosity toward the defendant." The district attorney then made a statement, which was transcribed by the court reporter, that the appellant had made statements inconsistent with the judge's remarks complained of and had failed to explain these inconsistent statements.

The circuit judge then stated that the appellant's offer to apologize, which was included in the amended handwritten motion for the judge to recuse himself, was totally inconsistent with the latest statements made by the appellant which did, in fact, compound the contempt. The judge then found R. W. Boydston, Jr. to be in direct contempt and sentenced him to a term of thirty days in the Winston County jail. From that judgment and sentence this appeal is taken.

The appellant assigns as error that the Honorable Circuit Judge of the trial court erred in his holding that any of the language or matter contained in the motion of the defendant for the Honorable Judge to recuse himself was contemptuous, and in adjudging the defendant to be in contempt of court and sentencing him to serve thirty days in the Winston County jail.

Section 165 of the Mississippi Constitution which deals with matters coming before a circuit court judge for which he should recuse himself states in part as follows:

> No judge of any court shall preside on the trial of any cause, where the parties or either of them,

shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by the consent of the judge and of the parties. . . .

Although Mississippi Code 1942 Annotated section 1152 (1956) requires that "all such appeals shall be tried on the record . . . ," which we have followed in this cause, nevertheless we also take judicial knowledge of that which is common knowledge and which has transpired in the circuit and supreme courts of this state. We note that there have been or are now pending in the circuit courts, federal court of the northern district of Mississippi and in this Court matters involving litigation relating to the Circuit Judge of Winston County and this appellant.

It is the opinion of this Court that, although the trial judge may properly rule on his own disqualification to hear a case, nevertheless in this specific instance where this particular appellant is a party to the litigation before this particular circuit judge, the circuit judge should have recused himself because of the ill will and animosity exhibited by both parties, which possibly stems primarily from appellant's unsuccessful attempt to defeat the present circuit judge. *Barnes v. State*, 220 Miss. 248, 70 So. 2d 920 (1954). It is the opinion of this Court that this particular situation falls within the meaning of the phrase in section 165 of the Mississippi Constitution, to-wit: "[O]r where he may be interested in the same." It is further the opinion of this Court that from the record, the motion to recuse, and the amendment thereto, sufficient proof is wanting to merit a contempt judgment. The wording of the appellant's motion that the circuit judge recuse himself under the well established circumstances, in the opinion of this Court is not sufficient to bring it under the decision in

Ex Parte Redmond, 156 Miss. 582, 126 So. 485 (1930): Even though the motion to recuse may not have been well taken, it would not have constituted a direct contempt.

While these proceedings took place only before the court, the circuit clerk, the sheriff and the district attorney, nevertheless such grievous episodes of this nature are not calculated to generate public respect for the bar or bench. Fortunately most lawyers and judges in this state treat each other with respect, and decorum prevails in our temples of justice. This opinion does not in any manner inhibit trial judges and chancellors from the exercise of the duty and right to see that their respective courts are operated with dignity and decorum.

For the foregoing reasons the judgment of the circuit court is reversed and the appellant is discharged.

REVERSED AND APPELLANT DISCHARGED.

GILLESPIE, P.J., AND JONES, PATTERSON AND SMITH, JJ., CONCUR.

JOHNSON *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 5485. Argued April 21, 1971—Decided June 7, 1971

In a charge of criminal contempt against petitioner which arose from petitioner's alleged violation of courtroom procedure during an earlier criminal trial where it is not clear from the record that the judge was personally aware of the contemptuous action when it occurred, petitioner should be provided a fair hearing with an opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete. And where a motion that trial judge recuse himself was supported by lawyers' affidavits that the judge had revealed deep prejudice against civil rights workers, and the judge was a losing defendant in a civil rights suit brought by petitioner, he should have recused himself from trying the charge.

233 So. 2d 116, reversed and remanded.

Stephen W. Porter argued the cause for petitioner. With him on the brief was *Richard B. Ruge*.

G. Garland Lyell, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *A. F. Summer*, Attorney General.

PER CURIAM.

Petitioner, a defendant in a criminal proceeding in the Circuit Court of Grenada County, Mississippi, was summarily convicted of criminal contempt by Judge Marshall Perry of that court.

The alleged contempt occurred on January 23, 1967. It occurred after Judge Perry directed the bailiffs and deputies to keep all people entering the courtroom from walking between the space reserved for jurors and county officers and the judge, while jurors were being called. A deputy attempted to route petitioner around the area

in question whereupon, according to the orders adjudging petitioner in contempt, he said:

> "What the Hell do you mean go around.
>
> "Said Johnson, defendant, then continued to stand and look around over the room, disrupting the court proceedings."

Judge Perry, however, did not take instant action on the alleged contempt but only had petitioner removed from the courtroom. The next day, January 24, he ordered that process issue against petitioner directing him to appear February 1, 1967, an action he later rescinded. On January 27, 1967, petitioner, an active civil rights worker, asked through his attorney that Judge Perry recuse himself, asserting:

> "a. That Judge Perry is personally prejudiced against the defendant and against the civil rights organizations he represents.
>
> "b. That Judge Perry is personally prejudiced against the lawyers' organization defending Mr. Johnson, namely the Lawyers' Committee For Civil Rights Under Law."

The motion was supported by two affidavits of lawyers that Judge Perry, through charges made to grand juries in his courtroom, revealed deep prejudice against civil rights workers and civil rights lawyers.

No hearing was ever granted on that motion.

When petitioner was removed from the courtroom on January 23, 1967, his lawyer, one Rowe, objected to Judge Perry's action. Judge Perry ordered Rowe arrested and charged with criminal contempt. On January 31, 1967, a federal court in Mississippi issued a temporary restraining order enjoining trial of the contempt charge against Rowe; and we are advised that that charge has never been further prosecuted.

On February 1, 1967, petitioner filed a petition for removal of the contempt proceedings in his case to the federal court. On November 14, 1968, that court remanded the case to Judge Perry's court. Thereupon Judge Perry ordered that a $1,000 bond be posted guaranteeing petitioner's appearance on January 27, 1969, to answer the contempt charge.

On January 22, 1969, petitioner and others filed suit in the federal court to enjoin trials of either Negroes or women in the Circuit Court of Grenada County until such time as Negroes and women were not systematically excluded from juries. Judge Perry was named as a defendant. The federal court held a hearing on January 24, 1969, and on January 25, 1969, temporarily enjoined Judge Perry from discrimination "by reason of race, color, or sex" in jury selections.

Two days later, January 27, 1969, Judge Perry adjudged petitioner in contempt and sentenced him to four months and set bail at $2,000 pending appeal. He denied petitioner's request for a hearing on the merits and for an opportunity to show why Judge Perry should not recuse himself. On appeal the Supreme Court of Mississippi affirmed the contempt but reduced the sentence to one month. 233 So. 2d 116. The case is here on a petition for a writ of certiorari which we granted. 400 U. S. 991.

Instant action may be necessary where the misbehavior is in the presence of the judge and is known to him, and where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court. *Cooke* v. *United States*, 267 U. S. 517, 534; *Harris* v. *United States*, 382 U. S. 162, 165. The contempt power is within the judge's "arsenal of authority" which we recently described in *Illinois* v. *Allen*, 397 U. S. 337. But there was no instant action here, a week expiring before removal of the case to the federal court was sought.

Moreover, from this record we cannot be sure that Judge Perry was personally aware of the contemptuous action when it occurred. The State's version of what happened is described as follows in its motion that petitioner show cause why he should not be punished for contempt:

> "[T]he Sheriff and Deputy Sheriff, Howard Hayward seized Robert Johnson and immediately carried him before the Circuit Judge, Marshall Perry, and *related to the Judge what had transpired.*" (Italics added.)

As we said in *In re Oliver*, 333 U. S. 257, 275–276,

> "If some essential elements of the offense are not personally observed by the judge, so that he must depend upon statements made by others for his knowledge about these essential elements, due process requires . . . that the accused be accorded notice and a fair hearing . . . ."

And see *In re Savin*, 131 U. S. 267, 277.

It would, therefore, seem that a fair hearing would entail the opportunity to show that the version of the event related to the judge was inaccurate, misleading, or incomplete.

We mention this latter point because our remand will entail a hearing before another judge. In concluding that Judge Perry should have recused himself, we do not rely solely on the affidavits filed by the lawyers reciting intemperate remarks of Judge Perry concerning civil rights litigants. Beyond all that was the fact that Judge Perry immediately prior to the adjudication of contempt was a defendant in one of petitioner's civil rights suits and a losing party at that. From that it is plain that he was so enmeshed in matters involving petitioner as to make it most appropriate for another judge

to sit. Trial before "an unbiased judge" is essential to due process. *Bloom* v. *Illinois*, 391 U. S. 194, 205; *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 465.

We accordingly reverse the judgment below and remand the case for proceedings not inconsistent with this opinion.

Reversed and remanded.